92-1381

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR N. BERNKLAU,

Petitioner,

vs.

THE UNITED STATES OF AMERICA, THE DEPARTMENT OF VETERANS AFFAIRS and JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the inability of veterans to obtain and a fair and impartial hearing pursuant to disability claims is subject to constitutional review by Article III Courts ?

2. Whether the Federal Courts have jurisdiction to entertain constitutional challenges to the operation of the VA claims adjudication system ?

3. Whether the due process protections afforded welfare recipients, as expressed in Goldberg v Kelly, 397 U.S. 254 (1970), apply to needy veterans, recognizing that approximately 20% of all veterans claims are based upon need ?

4. Whether this Court will resolve the acknowledged conflict between the 7th and the 2nd Circuit over whether the VA's unpublished policies, practices and procedures are subject to judicial review, as held in Marozsan v U.S. (in banc) 852 F.2d 1489, (1988) and Johnson v Robison 415 U.S. 361 (1974)

5. Whether the Court of Appeals for the Federal Circuit was correct in its holding that the Judicial Review Act of 1988 (P.L. 100- 687) is constitutional ?

6. Whether the Court of Appeals for the Federal Circuit has any jurisdiction over the Court of Veterans Appeal's judicial conduct ?

7. Whether the Court of Veterans Appeals is permitted to conduct ex parte proceedings to the exclusion of the petitioner and other pro se veterans ?

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OPINIONS BELOW

1. Order upon a Combined Petition for Rehearing and Suggestion for Rehearing In Banc was denied by U.S. Court of Appeals for the Federal Circuit on 11/25/92.

(Appears on pages A-1,2)

2. Decision of the Federal Circuit Panel, was both dismissed - in - part and affirmed - in - part on 10/9/92.

(Appears on pages A-3-13)

3. Appellant's Combined Petition for Reconsideration and Review (in banc) was denied by CVA on 3/23/92.

(Appears on pages A-14,15)

NOTE: note of the above opionons are citable as precedent although a public record. The disposition thereof will appear in tables published periodically.

JURISDICTION

Basis for Jurisdiction :	**Constitution**
	P.L. 100-687
	38 U.S C. sect.,4092
	28 U.S.C. sect.,1331
	28 U.S.C. sect. 1361
	28 U.S.C. sect. 1254 (1)
Venue:	**P.L. 100-687**
	28 U.S.C. sect. 1391 (e)

I. Statement of the Case

A) Nature of Case

This action arises under the Constitution challenging the V.A.'s budgetary driven " quota system " of claims adjudication which denys the appellant and other veterans (in the tens of thousands) of fair and impartial claims consideration.

Moreover, redress of implausble VA decisions (simple justice) is expressly denied under 38 USC 211 (a), [now 511 (a)] which precludes judicial review, notwithstanding enactment of P.L. 100-687, irrespective of the circumstances.

Accordingly, VA bureaucrats are judge, jury, Court of Appeals, Supreme Court, and often attorney for both sides, inter alia. The law of Common sense requires that no agency (or man) be the sole judge of its own wrong-doing.

Further, the VA uses numerous

unpublished " sub rosa " policies, practices and procedures, the totality of which, is violative of petitioner's (and other veterans') First and Fifth amendment rights to include the right of counsel, due process and equal protection.

Petitioner submits that unfair V.A. practices and procedures are clandestinely structured to cause the petitioner and other veterans to abandon valid claims in utter confusion, frustration and despair or failing in that objective, to hold hearings and render implausible decisions which make a mockery of impartiality and the due process protections guaranteed under the Constitution, relevant statutes and case law.

Additionally, petitioner submits that the lack of judicial review and the meaningful right to retain an attorney fosters a climate of unconstitutionality resulting in impermissive V.A. practices

and procedures, evidencing flagrant bureaucratic abuse, which clearly demonstrate that the V.A. has run amok with unbridaled power. [1]

Some specific VA policies, practices and procedures complained of by the petitioner, which in their totality are unlawful, as clandestinely implemented, are as follows:

1) Budgetary " not fact driven " quota decisions employed when adjudicating claims (Appendix:C-50, C-84,88,89)

2) Lack of an independent decisionmaker. (see Appendix: C- 51)

3) Questionable medical evaluations performed by intimidated VA physicians, some at the rate of one per minute; also refusal to sanction independent medical opinions. (Append: C-21;C-56,57; C-83,84)

4) Treating physician or expert medical

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[1]. Lord Acton: " Power corrupts, absolute power corrupts absolutely."

opinions rendered in behalf of veterans are routinely trashed by the VA's general practitioners. (See Appendix: C-53)

5) MRI's, cat scans, x-rays and other diagnostic tools are deliberately misread in order to obtain results contrary to the facts in conformance with the VA's hidden budgetary agenda. (App: C- 119)

6) Facts are deliberately distorted to support decisions devoid of reason. See BVA decision (C-120) re travel to D.C. via AMTRAK which disqualified petitioner from obtaining 100% unemployment benefits despite the unambigious statements of four Doctors, accompanied by mri's, cat scans, x-rays, inter alia. Inexplicably, two of the Doctors were employed by the VA .

7) Hearings are often covertly denied veterans. (Appendix: C-58,59; C-60-65)

8) Veterans lack subpoena or cross examination power needed to compel the VA to confront the facts or its errors.

9) Different treatment is accorded similiarly situated veterans, by the VA, depending upon but not limited to the congressional district or state of residence, who represented them, and the abject failure of VA to codify its decisions which contribute to a lack of uniformity.App:C1-4;5-8;42,43;79-84;94-97

10) BVA decisions are subject to productivity quotas requiring decision makers to render between 40-80 decisions per week. The emphasis is placed upon denying claims, since it's easier to deny than approve claims. App:C-13-15;C-106,107

11) To meet unrealistic productivity decision quotas of 40-80 per week, the adjudicators with the full knowledge and consent of their superiors, resort to " courtesy decisions ", or signing off on claims never read, and in the process thereof, denying veterans the full due process consideration they are entitled to

under 38 U.S.C. (App: C-9-15;C-104-110)

12) BVA allowance rates, thought for over 20 years to be at 13 %, are considerably less, perhaps within a 4-6 % range. C-9,10

13) The VA engages in the premature denial of claims. (See appendix: C-18-20)

14) Lack of due process as evidenced by: (Appendix: C-33-35 (par 14,15,17); C-36-39 (par. 18,19,22-24);C-70-75; C-76-84; C-104-110; C-111-115; C-116-118)

15) The VA practices intimidation in order to obtain the goals demanded by the Office of Management and Budget. C-40-43;C 44-46; C51;C68,69;C116-118;B-3,38 U.S.C. 3402(a)2

16) This Court in Johnson v Robison relied upon the VA's assurance that it had achieved a degree of uniformity which the Courts could not duplicate, and consequently, premised a portion of its rationale when upholding the constitutionality of 38 USC 211(a), on that false representation. Appendix: C-5-10;C-79-84; C 111-115

17) This Court in Johnson v Robison further premised its rationale for upholding the constitutionality of 211 (a) on the VA's assurances that it could adjudicate technical and complex veterans claims better than the Courts. That too was false. (See Appendix C-10-12;C-21; C-32-39 (par 15,17,18,19,22,23,24); C-47-55; C-82-84; C-107,108; C-118).

In sum, the VA can do whatever it pleases, whenever it pleases, unhindered by judicial review, or the procedural safeguards imposed upon other agencies.

Further, absent meaningful Congressional oversight, absent the interest of the press, absent the active participation of the legal profession ($ 10 fee limitation and other deficiencies), absent the protective umbrella of the NVSO's, who have betrayed their own members'interests on the alter of government largesse - is it any wonder,

that the VA has run amok with unbridaled power ? (see Appendix: C- 22-26; 27-31)

Additionally, judicial cognizance must be taken of what prompted the SSA bureaucrats in Bowen v The City of New York to employ the unlawful practices this Court so eloquently ruled against in Bowen. Said unlawful practices originated from the VA bureaucrats success in depriving veterans surreptitiously of their disability claims by rendering implausible decisions, contrary to the facts, in conformance with the requirements of the Office of Management and Budget.

Likewise, judicial cognizance must be taken of the several safeguards prevalent in Bowen (SSA) which are missing at the VA. Importantly, SSA recipients have a large block of attorneys banded together in an organization called NOSSCR, whose members routinely practice before the SSA; no such organization exists re veterans

representation. The SSA is required to get their decisions thru ALJ's and State Agencies; not so at the VA, who hold all the cards and its adjudicatory personnel hostage to advancement, demotions, bonuses and unrealistic productivity goals. Also, social security recipients have judicial review, expressly denied veterans.

The foregoing explains why the unlawful practices of the SSA were discovered within a relatively short time whereas those pertaining to veterans remain to be disclosed 60 years later - and only if, this Court will allow litigation of the unconstitutional treatment accorded veterans' claims.

It also explains why, petitioner has more evidence before discovery than Bowen had after discovery. Moreover, there are literally thousands of conscience stricken VA employees and National Veterans Service Officers (NVSO's) ready to spill

their guts - if only, someone would ask them a question. So far no one's asked.

B) The VA's " Non-Adversarial " Myth

Numerous judges in other cases (including this Court) have referred to the VA's non adversarial system in overly respectful and reverential tones without any factual understanding of what it is, and what damage is being done to the social compact between the American people and its citizen-veterans. The facts are that both the American people and the Courts have been hoodwinked into believing that the system is fair to veterans; and that the nation's pledge to its veterans, their widows and orphans is being honored.

Unfortunately, nothing could be further from the truth as the facts will clearly demonstrate.

What if you were injured in the Army, but were denied benefits on the pretext

that you had a prior service injury; but none had occurred and no evidence was forthcomimg that it had - but nevertheless, the denial persisted for over thirty years without the possibility of judicial review - would you think that was non- adversarial ? (C-121,122)

Then, what if, you had finally overcome that prior service injury hurdle and now proceeded to document the extent of the injury via the use of medical experts (both within and without the VA) incorporating x-rays, mri's, cat scans, inter alia - and then, a VA doctor, with no special orthopedic expertise deliberately misread the cat scan so as to obtain a different result and thus continue the denial ? And then, when confronted with the intentional misreading - the VA " doctor " acknowledged the facts, saying that:

" I can't write down what I told you. It

would make the whole orthopedic department look bad since we refused you a cat scan for 6 1/2 years and misdiagnosed you ! " (C-119)

Is that consistent with the actions of a non- adversarial system ?

Additionally, what if those previously cited hurdles, some 37 years later were all removed, but now the BVA reasons that since the petitioner was able to come to Washington, D.C. via Amtrak with the aid of a tens unit (in great pain) that his injury didn't render him unemployable despite the professional opinions of four expert orthopedic doctors (2 from the VA) that the petitioner could not work. (C-123,124). A cursory visual examination by the BVA panel was all that was required to trash the professional opinions of four treating physicians. Do those actions comport with the perception of a non adversarial system ?

Throughout all of the above, Petitioner was never permitted to confront or

question VA assertions or theories or creative denials. Never once was petitioner allowed to subpoena or cross examine VA employees pursuant to any of their deliberate falsehoods. Meanwhile, the VA carried on a secret war against the petitioner and other veterans in deference to the budgetary constraints imposed by the Office of Management and Budget. Coinciding therewith, petitioner was denied access to the courts, rendering him helpless to combat what the VA practiced in secret and dared not expose to public examination. **For example** :

1) **Preferential Signature Lists**

A secret list was developed by BVA Chairman Eaton composed of 12 influential Congressman and Senators (either on Veterans' Affairs Committees or occupying significant leadership roles in Congress) whose constituents were singled out for preferential treatment to the detriment of

other similarly situated veterans. (C-1-4)

2) **Courtesy Decisions**

BVA adjudicators' practice of signing off on decisions without ever reviewing the facts thereof in order to fulfill BVA Chairman Eaton's productivity requirements of 40-80 cases per week. Failure to meet such requirements, would render BVA adjudicators ineligible for bonuses and/or advancement. (C-106,107); (C-10,11)

3) **No Uniformity of Decisions**

a) **Norman Johnson**, a former BVA employee testified that " case decisions were haphazard, unfair and probably illegal " and were " decided on differing grounds, and for reasons not contemplated by the laws and regulations. " (C-80)

b) **BVA Chairman**, Kenneth Eaton, acknowledged before the House Veterans Affairs Committee : " Yes indeed it is quite true that there is what I might say is a significant variance

between different sections of the Board and how they see these cases. " C-112,113 Chairman Eaton further acknowledged that : " you can have equal cases,identical,where one will get more than the others. " C-113

c) No codification of BVA or Regional office cases which further contribute to a lack of uniformity.

Based upon all of BVA Chairman Eaton's testimony he couldn't get uniformity within the same building, on the same floor or within the same room, much less throughout the United States. But that didn't prevent the VA from hoodwinking this Court re Johnson v Robison 415 U.S. 361 (1974) into accepting the VA's blanket assertion that only it could achieve uniformity of decision making whereas the courts could not.

4) Too Many Valid Claims Denied

a) Philip R. Wilkerson, Ass't National Director for Claims (American Legion)

testified before the House Veterans' Affairs Oversight subcommittee hearing, 99th Cong., 1st session, 10-11.(1985), at page 40 thereof, that:

" In our judgment too many valid claims are being denied by the regional offices, and the denials are subsequently confirmed by the Board of Veterans Appeals."

b) Donald H. Schwab, National Legislative Director for the VFW testified that:

" Many service officer's are increasingly disappointed in the denial of cases which they believe have considerable merit." (C-88, 89)

c) Tracy v Gleason, 379 F 2d 469 (1967), a case (inadvertently) decided by the U.S. Circuit Court of Appeals, D.C., evidences far better than any Congressional testimony, how unfairly the VA treats its veterans. In a blistering condemnation of the VA, the Court held:

" In our opinion the complaint tells a story of arbitrary and capricious action on the part of the officials:"

" a) the Administrator acted arbitrarily

in the circumstances when he terminated the pension of Tracy because that unfortunate, totally disabled by insanity, had failed to return an income questionaire; "

" b) The Board of Veteran Appeals acted arbitrarily in affirming the termination after it had learned the facts;"

"c) The Administrator acted arbitrarily in failing to make payments for the full period of discontinuance after he had been told what he should have known before: That George Tracy was insane and was totally and permanently disabled in 1949 and continuously thereafter. "

Petitioner would make one more point - How could the " Justice " department have even defended the action once the facts were known. Has it no responsibility to the American people and its veterans !!?

d) And what about this case. Also what about the thousands of veterans who have lost arms, legs and eyes in combat who have received little or no compensation while the VA can not be brought to account.

e) Cong. McEwen, Chairing an oversight Committee hearing on Oct.4, 1990, on page

11 thereof, remarked :

" I'm just asking, what do I do ? When I know this is taking place, and the VA has its folder here that says the guy can run in the Olympics, and he's sitting here in front of me and he's crippled, three times it says the guy's fine. What do I do about that ? "

Indeed what can he do ? Absolutely nothing ! And if a Congressman sitting on the HVAC can't do anything, what can a powerless veteran do, no matter the circumstances or the evidence ?

5) VA Surreptiously Denies Veterans' Hearings.

a) Mr. T.A. Verrill, Adjudication Officer, San Francisco, VARO, wrote a letter on April 20th to his section chiefs advising his subordinates: " Although VAR 1103 permits a hearing anytime on any issue, we do not have the resources to operate in this way." "... We can always explain why a hearing is not appropriate at a particular stage in processing. "

"..... I know you are aware of these points but the appellant isn't. " C-58,59

b) BVA Chairman Eaton testified before the U.S. Senate re traveling board hearings that " because of the limited number of such traveling board Section hearings, the BVA did not routinely tell claimants about this option."

According to Mr. Eaton :

" the traveling board hearings are scheduled by giving veterans' service organizations a certain number of hearings, and allowing the service officers to designate who receives ahearing. " (C-62,63)

When asked whether there is a quota, Mr Eaton replied: " In effect it has to be that way. " (C-65)

Under the circumstances poor veterans were denied the opportunity for a hearing since they lacked the resources to go to Washington D.C. and were kept ignorant of their option to appear at traveling board hearings conducted in their own home locales. Moreover, those veterans, not represented by service officers never knew

or had a chance to particpate in that option either. How fair was that, in view of the fact that veterans chances for success were far greater if they were present at hearings ? (C-64)

6) Intimidation of BVA Adjudicators

a) Dr Alcide Pellerin (a former BVA adjudicator) testified before the U.S. Senate advising that he was coerced on numerous occasions into rendering decisions contrary to the facts and his own professional opinion, inter alia. (C-51)

b) Norman Johnson, another BVA employee also testified that he was likewise intimidated and that agency decisions were unfair. (C-77; C-83,84)

c) Kenneth T. Blaylock, then National President of AFGE, (116,000 VA members) testified bofore the House Veterans Affairs Committee :

" It appears to us that large numbers of veterans have not received the benefit of reasonable doubt on any consistent basis."

" The informality of the Veterans Administrations appeal procedure combined with the absence of precedence in the disposition of cases, leaves wide discretion for inconsistent and uncontrolled decision making by the regional offices. In the absence of court review, there is no effective institutional check on arbitrary or impermissable action. " (C-73)

7) Intimidation of National Veterans' Organizations (NVSO's)

a) When it appeared that judical review might pass the Congress, the VA's Gael Gompf wrote her famous blackmail letter which intimidated the major NVSO's into abandoning recently held positions in favor of judicial review. That letter, contained in part, the following:

" Moreover, many special considerations currently extended to veterans service organizations may have to be curtailed. The providing of VA space and facilities, informal access to adjudicatory personnel, etc., could be affected by judicial oversight and increased representation by private attorneys. " (C-42)

And there was much to fear in view of the infamous 38 U.S.C. 3402 (a)(2), (1979),

which mandated:

" The Administrator may, in his discretion furnish , if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized. " (B-3)

That space and those office services equal tens of millions of dollars in gratuities or donations. Further, that space provided in every single VA facility is essential to obtaining membership and to promoting the NVSO's prestige.

b) James M. Magill, VFW Director of National Services, acknowledged in a written letter to then, Senator Alan Cranston, that he was indeed intimidated by the VA's threat to discontinue providing free office space and services C45,46

8) <u>Trashing of Medical Experts' Opinion Favoring Veterans</u>

a) Dr Alcide Pellerin (former BVA Adjudicator) testified before the U.S. Senate that implausible medical decisions contradicting those of world famous

physicians are rather routine.

> " In contrast, should the veteran submit an opinion from a board certified specialist, say from some institution like the Mayo or Lahey clinic, the Arthritis Foundation or the Georgetown Medical Center, that only serves to reopen his case, and is considered as trash by the VA. " (C-53)

b) Deep Throat Letter # 1. An anomymous VA employee whose information was later validated by a U.S. District Court located in San Francisco wrote:

> " In order to operate at reduced staffing, many regional offices no longer employ full time doctors for the rating board. Instead a part-time doctor is borrowed from a local medical center one to two times a week to sign his name to the accumulated rating decisions. He may spend <u>one minute or less</u> on each decision. " (C-21)

Under such circumstances how much technical medical expertise was employed, if any ? Yet the VA argued in <u>Johnson v Robison</u>, that <u>only it</u> could make the difficult, technical medical decisions required in veterans' disability claims. Unfortunately, not a single shred of evidence can be found in support thereof. The VA simply <u>lied</u> to this Court.

c) Norman Johnson (former BVA Adjudicator) testified before the U.S. Senate re service connection for a black Korean veteran:

" The elements of the case were clear - his induction physical examination report indicated normal feet. The separation physical indicated " pes planus " or flat feet, not an usual development over the course of Army service and one that can be painful anbd limiting for all of the jokes that are made of it. " The facts and the law were clear, but the decision was returned to me with instructions to deny the claim.

" ..... I asked the section chairman why the decision was to be a denial. He explained that it was because the veteran was black and all black people eventually get flat feet. It was a " racial characteristic " ! (C-83,84)

d) Petitioner Bernklau's medically false cat scan reading (Supra page 11,12)

9) <u>How the lack of judicial review contributes to a climate of veterans claim abuse</u>.

The lack of judicial review has emboldened the VA to treat veterans worse and worse. In <u>Maroszan v U.S</u> (in banc), 852 F.2d. 1469, (7th Cir, 1988) the VA in open

Court argued that even if veterans were denied claims solely on the basis of race, color and gender, that the Courts lacked jurisdiction pursuant to 211 (a) to even review such clearly unconstitutional acts. Thereafter, asserting that 211 (a) mandated that it was none of the Court's business. Moreover, the VA's argument was demonstrably at variance with the U.S. Supreme Court's holding in Johnson v Robison which specifically permitted attacks on the constitutionality of the VA claims system.

10) Bureaucrats Abuse of Social Security Recipients Originated at the VA.

Bureaucrats reasoned that if they could treat veterans in such shabby fashion, why not social security recipients. This Court should recall that in City of New York v Heckler, 578 F. Supp. 1109 (1984) which culminated in the unanimous Supreme Court decision in Bowen v The City of New

York, sustaining the City of New York, in its allegation of unconstitutional claim treatment accorded mentally impaired recipients. These recipients were callously removed from the Social Security rolls without rhyme or reason in deference to the Office of Management and Budget.

Further, this Court should remember what U.S. Sen Cohen said in Schwieker v Chilicky, 487 US 412 (1987) :

" The message received by State Agencies, swamped with cases was to deny, deny, deny, and, I might add, to process cases faster, and faster, and faster. In the name of efficiency, we have scanned our computer terminals, rounded up the disabled workers in the country, pushed the discharge button, and let them go into a free fall toward economic chaos. " At 416.

Other legislators reached similar conclusions. U.S. Senator Moynihan said: " The Social Security Administration has tried to reduce program cost by terminating the benefits of thousands of those truly disabled. " At 416.

Congressman Rostenkowski alluding to a " massive number of beneficiaries who have lost their benefits over the last three years even though they are truly disabled and unable to work. " At 416.

" The Social Security Administration itself apparently reported that about 200,000 persons were wrongfully terminated, and then reinstated, between March 1981 and April, 1984. " At 416.

" The unnececessary suffering, anxiety, and turmoil - has been graphically exposed by dozens of Congressional hearings and in newspaper articles all over the country. " At 417.

Petitioner submits that the Social Security scandal arose out of the unconstitutional treatment accorded veterans. Why doesn't this Court know about the veterans scandal (VETGATE) ? Simply put, Veterans lack the right of judicial review while the ten dollar attorney fee limitation still casts a pall over veterans' claim representation.

Moreover, the leadership in the major veterans organization have betrayed their own members in deference to the VA Secretary's discretionary power to remove largess aggegating $10 million of free space and office services.(38 USC, 3402 (a) (2)) or (B-2), C 40-43, C-44-46.

C. Veterans Judicial Review Act of 1988

Or (VJRA)[2] was enacted primarily to provide veterans with judicial review of VA claims decisions, heretofore denied them, for over one hundred years. Many veterans' organizations had alleged that numerous VA decisions were " implausible " motivated by budgetary, not fact driven considerations - and consequently, held hostage to the fiscal restraints imposed by the Office of Management and Budget. Likewise surfacing, were allegations of a self- serving bureaucracy concerned more with personal advancement, productivity [3]

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[2] Now known as Public Law 100-687, since its prior name " Veterans Judicial Review Act " was clearly inappropriate, being totally devoid of judicial review.

[3]. To obtain bonuses, BVA personnel were required to meet unrealistic goals requiring them to render 40-80 decisions per week. In order to reach said goals, BVA adjudicators resorted to " courtesy decisions " a practice, wherein other BVA members signed off on decisions never read, and which were later reciprocated, on a quid pro quo basis.(C- 10,11)

and administrative bonuses than rendering professional, fair and impartial decisions.

Additionally, Congress was galvanized into action when it learned that Justice Department attorney's were arguing in Marozsan v U.S. (en banc) 852 F. 2d 1469, (7th Cir, 1988) at 1478, that the Courts lacked jurisdiction to review V.A. decisions, under 38 U.S.C., section 211 (a) - even when, the V.A. denied claims solely on the basis of race, color and gender; and that the V.A., could not be

" CALLED TO ACCOUNT FOR ANY METHOD IT USES IN ADMINISTERING VETERANS' BENEFITS LAWS, NO MATTER HOW EGREGIOUS "

Favoritism, implausible decisions and evidence that the VA claim system had run amok[4] with unbridaled power were

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[4]. Special consideration accorded constituents of influentialCongressman. Preferential signature list (C-1-4). Implausible decisions(C49-51;C83,84;87,88)

demonstrated in numerous Congressional hearings. Accordingly, Congress could no longer hide behind that old bromide: " if the system ain't broke, don't fix it ? " Now Congress had to fix it, or become irrelevant to the Court process which was moving inexorably toward declaring 211 (a) unconstitutional re: Marozsan, inter alia.

However, a funny thing happened on the way to the bill's enactment. Literally, in the middle of the night, and without public imput - an article I Court was established, which sits only in Washington, D.C.; approximately, 90% of all veterans were statutorily excluded from the benefits thereof (assuming there were any), if their claims were finalized prior to November 18, 1988; impossible conditions were imposed, which continue to deny veterans access to the courts and attorneys (70 per cent of veterans are represented pro se - the rest, largely by

attorney's they've never met). Most however, intimidated by the process, unable to secure the services of an attorney, merely abandon their claims.

Moreover, the local public and press for all intents and purposes, are excluded from the process considering the distances and secrecy involved in veterans adjudications. Not a single veterans' case or its outcome has been reported to the local citizenry. Not a single newspaper has anyone assigned to the VA or the CVA court; and wouldn't know where to go, if assigned.

Unfortunately, no one seems to care, while veterans endure a new tyranny worse than before. Hope, which was initially promised has been all but extinguished, while the pledge of a fair and impartial hearing remains more elusive than ever, hopelessly mired in chicanery and bureaucratic red tape.

The new CVA court acts alone or in concert with the Secretary (ex parte) rendering Kafka-like decisions which defy all logic or reason. Its record is a dismal one. Of the 6000 claim actions pursued, it appears that CVA has rendered favorable decisions in 50, or less than 1%, three years after the laws enactment.

It further appears that none, save one, involve any real money. In that instance, the widow was represented by Morrison and Foerster, the prestigious San Francisco law firm. (Neither CVA nor Westlaw will confirm or deny these numbers)

Although another veterans " lost cause " claim matters little, respect for the rule of law and fairness matter much. Men have given their lives for this concept - and none more so than Veterans who perceive little to respect in either the VA claims adjudication process or the CVA's review thereof.

Claims in the tens of thousands have been routinely denied by the VA under one pretext or another for decades. In all this time, no article III Court has looked into the VA's " implausible " decisions based on " budgetary, not fact driven " considerations, nor has any court examined the practices employed which cause thousands of veterans to abandon valid claims in utter frustration and despair.

Under the circumstances, isn't it time that an article III court examine the constitutionality of the VA's claim system and its CVA appendage ? Heretofore the Courts have traditionally occupied a " resolution of last resort " role when all other options failed. That's what the founding fathers intended. Now is such a time, when this Court should exercise its inherent power to review (or cause to examine) a claim adjudication

system which is the shame of a nation.

The instant action, while not the most egregious, does reflect a systemic pattern of abuse, which if, the court conducts a detailed review thereof, will come to understand how a secret war is being waged against defenseless veterans under the guise of a " non adversarial" system. That system's sole purpose is to render budgetary decisions in deference to the Office of Management and Budget; just like the infamous social security cases [5]

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[5]. City of New York v Heckler, 578 F. Supp. 1109 (1984); Bowen v City of New York, 476 U.S. 467 (1986); and their numerous progeny. In Heckler, the Eastern District Court found at 1115, that " evidence of a fixed clandestine policy against those with mental illness is overwhelming. " Moreover at 1115, " Evidence at trial revealed that this covert policy was followed consistently from 1978 until at least the early months of 1983. " Further at 1124, the E.D. Court found that " physicians were pressured to reach conclusions contrary to their own professional beliefs..... " (Emphasis added) Similar Congressional testimony is available in veterans cases. (C-51,83,84)

involving similar, if not identical bureaucratic abuse.

D. Court of Veterans Appeals (CVA)
(the myth of judicial review or any semblance thereof)

After being mistreated by the VA since 1955, and a file three feet thick to evidence that fact, the petitioner decided to take advantage of the new VJRA law.

Unfortunately, Congressional intent to provide some judicial review was analogous to being a little bit pregnant. Only no evidence of pregnancy could be found; not even a modicum thereof or equal treatment or fairness anywhere.

What transpired at the CVA during petitioner's appeal was clearly out of Ripley (Believe it or Not) or Franz Kafka. **For example :**

1) The CVA after issuing orders over an

eighteen month period (contrary to numerous VA motions), ruled that petitioner's case was properly before the Court. Thereupon it reversed itself, without explanation and remanded this 37 year old fully documented case for further development.

2) Curiously, BVA Chairman Kenneth Eaton agreed with the petitioner and wrote on 5/1/90 via first lady Barbara Bush that :

" In short, it is my opinion that the April 4, 1990, appellate (BVA) decision denying you entitlement to a total rating was based on sound legal, evidentiary and medical principles. " ".... I can assure you that your claim was carefully analyzed by the Board Members so as to accord you every consideration."(Emphasis added)B-125

Inexplicably, the CVA completely disregarded BVA Chairman Eaton's letter to Mrs. Bush indicating that the VA had done its job well and had leaned over backwards to accord the petitioner every consideration employing the terms " sound legal, evidentiary and medical principles. "

Nevertheless, CVA remanded said case, without plausible explanation, back to the BVA for additional development, and without further instructions.

3) What further development ? None were enumerated, nor could any be divined. other than, the VA simply had no defense.

4) In fact the VA's attorneys admitted as much in their motion for remand of (8/28/91) when they acknowledged that the: " BVA did not point to anything in the record to support its view, ... " Moreover, the remand motion further stated that it required the BVA to explain " its reasons or bases for rejecting the assessment of four private physicians [6] to the effect that the veteran is " totally disabled " or unable to work, ..."

5) No notice, was taken of the fact that

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[6]. Two of the four private physicians referred to worked for the V.A. Besides there were many more private physicians rendering opinions in petitioner's behalf.

these four private physicans' statements were before the BVA and its Regional offices, on three prior occasions without being meaningfully addressed. Now the BVA wanted still another bite at the apple, which the CVA granted without addressing petitioner's brief and reply motion objecting to the remand. It was, as if, neither the petitioner nor the facts or the circumstances thereof mattered.

6) **But there was more**, much more which this Court should consider regarding fairness and equal treatment of pro se litigants at CVA.

a) **During** said litigation, the VA was discovered engaging in ex parte communications apparently with the CVA's tacit consent.

b) **It seems**, pursuant to one the VA's innumerable requests for an extension of time, the VA's attorneys unintentionally (mistakenly) furnished the petitioner

with a copy of its motion dated 7/22/91, which shockingly revealed the following:

" As Appellant is proceeding pro se, he has not been contacted regarding this motion " (Emphasis added)

c) The VA was continually late in supplying information on a timely basis (sometimes on any basis), repeatedly flouting CVA's rules by failing to file timely motions, while others were spurious and frivolous. As a consequence, the petitioner filed at least six motions requesting sanctions, none of which the CVA meaningfully addressed.

d) Petitioner can only speculate, as to why sanctions were never imposed upon the V.A., the CVA could hardly have sanctioned the VA Secretary while it was secretly communicating and/or conspiring to break its own rules behind the petitioner's back !

e) In the truth is stranger than fiction category, the V.A. not content with all of its obvious advantages:

attorneys v pro se litigants, proximity to the Court of Veterans Appeals, practicing in a complicated area of the law[7] in which only they had expertise, inter alia, decided that those advantages simply weren't enough, it needed more.

So what did the VA's attorneys do ? Why they moved into the same building occupied by the CVA so they could cummunicate ex-parte on a more secure basis, over lunch, social occasions, in the bathrooms or over coffee, inter alia. Besides, that would remove the post office " middle man ", thereby cutting down on its own tardy

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[7]. Chief Judge Nebeker, in an interview published by the DAV, June 1991, said: " Bar associations have taken the position that veterans law is such a highly technical speciality that lawyer's aren't competent to handle it. I can appreciate that. Lord knows, I'm still getting acquainted with it. "
Also, in response to the question of why so few veterans are represented by attorneys, replied: " One reason is that with the $ 10 limit on lawyer's fees, there hasn't been any crossing of the threshold by lawyers.

motions or briefs by two or three days.

7) Recusal of CVA Judge Donald Ivers

Ex VA General Counsel, Donald Ivers, confirmed in a Congressional hearing, more akin to a coronation - than a confirmation - was forced to recuse himself from the panel, in this case, on the grounds that his own conduct while General Counsel and his own testimony before the Congress disqualified him to sit in judgment thereof.

VA's General Counsel Ivers had often testified before Congress that veterans were not entitled to due process since their war related injury payments were nothing more than gifts; that the VA needn't explain its decisions, or assist them in the development of their claims. Moreover, that attorneys weren't necessary since the entire procedure was " non adversarial ". Further, despite knowledge of the VA's bag of "dirty tricks" directed against veterans, did nothing about it.

Although Judge Ivers recused himself in petitioner's case, he has since refused to do so in other cases despite similar grounds. In this, Judge Ivers is supported by Chief Judge Nebeker who unequivocally states that under 28 USC 455, that the only one who can cause a judge's recusal, is the judge himself ! [8] (Aronson v Brown,92-561)(CVA) (C-126)

Obviously, that pronouncement sets the law of recusal back to the days before Magna Carta. Mind boggling ! But that's exactly what veterans have to contend with pursuant to a series of outrages, relating to what passes for justice at CVA.

Accordingly, isn't it time some article III court interceded in behalf of the disabled veterans who have been

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[8]. Recently, the U.S. 3rd Circuit Court of Appeals, removed District Court Judge H. Lee Sarokin in the Rossie v Liggett case because he could not offer the required appearance of impartiality.

victimized by this cruel hoax of a " non adversarial" adjudication system whether it's in the guise of the Court of Veterans Appeals, the VA, or some other bureaucratic self serving boondoggle !

8) Upon completion of the adjudication process, CVA consigned the instant matter to what is commonly termed the " tables graveyard ", which means that Westlaw did not publish what transpired therein, except for notification in its " Veterans' Appeals Reporter ". Meaningful publication therein was not deemed necessary by CVA because nothing noteworthy has occurred.

Consequently, the veterans community was deprived of the knowledge that:

a) Judge Donald Ivers had been forced to recuse himself.

b) CVA was reluctant to impose sanctions upon the VA, no matter the circumstances while punishing veterans

upon the slightest provocation. Moreover, that six motions for sanctions involving contempt, obstruction of justice, untimely filing, frivolous and in bad faith motions to include the totality of its failure to comply with CVA's rules, orders, inter alia, were never substantively addressed.

c) VA attorneys had covertly moved into the same office building occupied by CVA, without any notification thereof to the veterans community. In fact, retaining their old address for mailing purposes so that no one would be the wiser.

d) CVA and the VA's attorneys had engaged in ex-parte communications, the extent of which remains to be determined.

e) CVA had reversed its prior orders of 18 months standing to accommodate the VA's admission that it had no basis to contest the case and needed more time to explain why it hadn't addressed the professional opinions of four treating physicians (two

from the VA) on three prior occasions.

f) CVA was unable or unwilling to explain itself regarding denial of petitioner's well grounded motion for summary judgment. Conjecturally, CVA may believe it has no authority to rule on the issue of summary judgment when it favors veterans - only when, it favors the VA.

However, no veteran has had his motion for Summary Judgment affirmed, while the VA, has had its motions for throwing veterans' cases out on the slightest technical or procedural violation approved forthwith by the thousands.

Meanwhile Chief Judge Nebeker, (DAV publication of June, 1991) was throwing the entire blame for veterans continually losing on their inability to obtain counsel and the technical complexity of veteran's law. He said:" the unrepresented veteran doesn't have a chance ". (C-126)

True enough, but there is much more here, which remains hidden from view - and which, only light, the great disenfectant, can expose so that disabled veterans may at long last obtain their constitutional right to a fair and impartial hearing.

There was much more that future CVA litigants needed to know before pursuing their remedies, but alas, none of it was deemed important enough to publish. After all, who's the loser ? Just veterans.

To recapitulate: **a)** The matter had been litigated since 1955; and with substantially greater intensity over the past five years. **b)** Four treating physicians (two of whom worked for the V.A.) had advised that the petitioner was unable to work " unemployable" due to injuries sustained while a member of the armed forces **c)** These opinions were supported by x-rays, cat scans, mri's, inter alia. **d)** BVA Chairman, Eaton

acknowledged that its review thereof was " based on sound legal, evidentiary and medical principles ". **e)** The VA's own attorneys before CVA admitted that the: " BVA did not point out anything in the record to support its view ".

Under the circumstances, what more was needed to obtain Summary Judgment, under FRCP rule # 56 ? If ever, an issue was ripe for Summary Judgment, it was this one. Yet petitioner couldn't get it. Why ?

Simply because, it would cause havoc by gaining publication thereof, and point the way (set unwelcome precedents) for veterans to obtain similar judgments.

Moreover, it would expose the V.A. to public ridicule and scorn, further damaging the myth of its "non adversarial" claims system.

E. United States Court of Appeals For The Federal Circuit

Thereupon petitioner pursued his legal remedies to the U.S Court of Appeals for the Federal Circuit Court which likewise ignored and/or failed to address the facts or the issues presented for its review - and/or in the alternative, acknowledged that it was lacking in jurisdiction to do so.

1) Issues Not Reviewable by the Court of Appeals For the Federal Circuit

a) The Federal Circuit did not meaningfully address whether the law, P.L. 100-687, creating its new jurisdiction permitted it to entertain attacks on the constitutionality of the VA claims system as held in Johnson v Robison and in Marozsan v the U.S. (en banc)

b) The Federal Circuit apparently declined on the grounds that this issue had not been raised heretofore in the CVA.

Petitioner explained that he was precluded from doing so, in view of the fact that only Article III courts have jurisdiction over constitutional matters, as decided under Marbury v Madison.

Therefore petitioner had no standing to raise the constitutional issue in CVA, an Article I court, nor did said court have jurisdiction over the matter.

Additionally, petitioner made plain that if the constitutional matter were brought up in CVA, it couldn't be accepted there unless it was initially brought before the VA's Regional Office, then the BVA, and thereupon to the CVA. Even so, among the forgoing, who even then, had the authority to rule on the constitutionality of the law or the unconstitutional claims treatment accorded veterans ? No one !

Unless this was a bureaucratic make-work project or an exercise in futility, the Federal Circuit's ruling that the matter must be brought before CVA, failed to address the circumstances under which such a ruling could be met.

The inescapable answer is that no one of the adminstrative agencies, or even the Article I court (CVA), has the power to render statutes unconstitutional when enacted by Congress. Moreover, where shall redress of Constitutional wrongs perpetrated by the agencies or instrumentalities of the government be brought ? Shall they be brought before the same people perpetrating those wrongs !!? Petitioner thinks not.

Under the circumstances, it's a real conundrum. No wonder the Federal Circuit refused to answer, but this Court must, or this issue will continue to remain in limbo, in a veritable jurisprudential

" no man's land " where so much of veterans law has settled for over a century without meaningful review - and unfortunately, upon a seriously flawed factual basis.

From petitioner's vantage point, it's time to revisit this issue de novo, at U.S. District Court level. Congress may pass laws, but it's clearly up to the Courts to determine what they mean, and what is constitutional.

Accordingly, where does petitioner start his constitutional action, in the District Courts ? In the VA's Regional Offices ? Elsewhere,in the BVA, or the CVA ? Where ?

No further response could be obtained from the Federal Circuit on the question of constitutional jurisdiction and where the issue may be initially raised.

c) The Federal Circuit declined to answer whether pro se veterans are entitled to equal treatment at CVA.

d) The Federal Circuit declined to answer whether ex-parte communications between the CVA and VA was permissable conduct.

e) The Federal Circuit Court declined to answer whether the flagrant and repeated flouting of CVA's rules by the VA without sanction or censure is acceptible judicial conduct.

f) The Federal Circuit declined to address even Chief Judge Nebeker published, June, 1991 statement in which he said that: " the unrepresented veteran doesn't have a chance " Since 70 % of all veterans appear pro se, that should have been a source of serious concern to the Federal Circuit - but it wasn't - failing to elicit a single comment.

g) The Federal Circuit declined to respond, as to why, not a single veteran had prevailed in its Court, four years after P.L. 100-687 enactment.

Is there something wrong with the law, or the Court or what ? Not a single comment, from the Federal Circuit, pursuant to a law which cries out for interpretation and/or review. Absolutely nothing to the veterans community begging for guidance. Just silence.

h) No response as to whether the Federal Circuit exercises any control over CVA's judicial conduct ? Just silence.

i) No explanation regarding why the instant case was consigned to the " tables graveyard " ? Was the veterans' community to be kept in ignorance over what had transpired herein ? More silence.

j) No response to the Summary Judgment issue, since it was a factual matter, precluding the Court's intervention.

2) <u>Issues Addressed</u>: Albeit Superficially by the Federal Circuit

a) The Federal Circuit's interpretation of P.L. 100-687, 38 U.S.C.A., section 7292

(d)(1),(2) held, that even if, the CVA's decision was arbitrary and capricious, (totally without basis), and if, the circumstances thereof, involved a factual matter, that the Circuit Court is wholly without jurisdiction. With such an interpretation, it is doubtful whether a set of circumstances could even be created under which a veteran could prevail. No wonder, nobody has. What do you suppose the " founding fathers " would say about that ? Can such an interpretation or law be constitutional ?

Is it possible that the Federal Circuit views itself as a potted plant with no power to meaningfully review anything brought to its attention by the veterans' community ? If it does, why can't it say so, in understandable, unambigious language, so that the issues may be clearly drawn. Its job is to illuminate, clarify, not pontificate, in legalistic

lanquage so obtuse as to render its judgments devoid of meaning to veterans, whose only crime, was to be injured while defending this nation and its liberties. What is the Circuit Court afraid of ?

b) The Federal Circuit asserts that it has sustained the constitutionality of P.L. 100-687 based upon its decisions in Wallace v Department of Air Force, 879 F.2d. 829, 832, (Fed. Cir. 1989) and Nagac v Derwinski, 933 F. 2d 990, Fed. Cir.1990), inter alia. However, none of those cases remotely approached the scope of issues brought forth herein. Books could be written pursuant to the matters distinguishing the aforementioned cases from the instant action.

For example, did any of said cases involve the issue of a veteran's inability to obtain a fair and impartial hearing ? Did any of said cases involve a constitutional challenge to the operation of the

VA's claim system,inter alia,ad infinitum? Accordingly, petitioner can find no relevance to the Circuit Court's prior holdings, as applied to this case.

Regretably petitioner deplores the Court's failure to address its impotence pursuant to the VA's arbitrary and capricious decisions. Based upon the Circuit Court's holding, a veteran can be lynched with impunity, while the Court witnessing the crime, does so with an air of bemused detachment. That's what the Circuit Court's ruling means in plain unvarnished language. That circumstance is intolerable, requiring this Court to say, it just ain't so.

Veterans appear pro se and doubtless ignorant in much of the law, but let no one believe that they're stupid, to be treated cavalierly and with so much disdain. After all, it doesn't take a rocket scientist to understand when you've

been " screwed " , and your constitutional rights voided where prohibited by law.

c) The Federal Circuit finds that petitioners assertion that Judge Donald Ivers, is not qualified to sit in judgment on any veterans case, wholly lacks merit.

That holding, is without basis in view of the fact that Judge Ivers removed himself in this case. And if he did so, in this case - why not, in other veterans cases. What is the difference between this veteran and other veterans ? Does the Circuit Court imply that Judge Ivers removed himself without cause ? Or what were the circumstances of his removal, the Circuit Court does not say, yet it holds that petitioner's request that Judge Ivers remove himself in all cases is wholly without merit. Does CAFC know something petitioner does not know - otherwise, the Court's ruling defies reason.

d) The Circuit Court finds that the

petitioner's objection, to the VA's attorneys being housed in the same building, as CVA, to be wholly without merit, despite the fact, that evidence given the Circuit Court clearly establishes that the VA's attorneys engaged in ex parte communication with the CVA. If there is nothing wrong with being housed in the same building, then why has it been kept a secret from the veteran's community, and why have they maintained their old mailing address ?

The Circuit Court failed to examine the evidence of prior wrongdoing by the VA, and consequently, is totally ignorant of what these VA bureaucrats are capable of doing. Does that make moving illegal ? No ! But any examination thereof, indicates that something is rotten in the state of Denmark, if not the VA and CVA. Their close proximity is reason enough to suspect the worst.

Based upon the forgoing it is clear that the U.S. Court of Appeals for the Federal Circuit (CAFC) has no jurisdiction over anything meaningful or is reluctant to exercise any power that it may have. Under the circumstances, the law creating veterans access to said Court is a cruel hoax or an exercise in utter futility.

II Is The Veterans' Judicial Review Act or P.L 100- 687 Constitutional ?

Petitioner submits, that in its totality, Public Law 100-687 is unconstitutional, considering the following:

1) Aproximately 90 % of all veterans have been excluded from the benefits thereof (assuming there are any) if their claims were finalized prior to Nov 18. 1988. Veterans never receiving due process, equal protection or access to attorneys in the first place, are now denied it in the second place, assuming it exists at all.

2 (a) Despite the law, CVA sits only in

Washington, D.C. CVA sees and talks only to VA attorneys. CVA clerks are generally uncooperative in keeping with the esteem veterans are held.

(b) CAFC sits only in Wash. D.C.

(c) Veterans are not permitted to hire attorneys during the initial and most critical (crucial) stage of their claim.

(d) 70 per cent of veterans can't find attorneys, even when permitted, despite the complexities of the law and procedures

e) Veterans are still not permitted to subpoena or cross examine bureaucrats making hostile statements.

Under the circumstances, the right of a veteran to be meaningfully heard is substantially compromised, if not lost.

3) Class action suits are not permitted preventing many similarly situated veterans from combining their financial resources and bringing concerted actions to obtain needed and uniform relief.

No way to enforce CVA decisions uniformly throughout the VA. Currently, the Regional offices and the VA have been detected circumventing CVA decisions [9]. Besides, cases favoring veterans have no legally binding precendential value,

4) Scope of judicial review is so limited, rendering it almost meaningless.

5) Effectively denies the public access to news of CVA decisions and awards, if any, pursuant thereto under the excessive secrecy provisions currently imposed.[10]

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[9]. Ronald Abrams Statement of 5/20/92 Director of National Veterans Legal Services, before SVAC, indicates that the Regional Offices wilfully ignores or circumvents CVA decisions, Page 29 thereof. His insight is particularly instructive.

[10]. Even in COVA cases, where the veteran has apparently prevailed, no one knows how much the veteran received. In one recent case, which the appellant has followed closely, the veteran prevailed and was remanded to the BVA, which awarded him 10% instead of 40% for the loss of an eye in 1952. Previously, he was awarded nothing. That case is now under further appeal. Would the Secretary dare offer such compensation, if the public knew ?

The public's right to know is substantially diminished since cases are tried only in D.C., considerably dampening the local press's enthusiasm to report.

6) Lack of an independent decision maker. The law notwithstanding, even CVA is an appendage of the VA. Impartial review is not possible, if judges have any institutional bias.

The VA's unconstitutional claims system has continued largely because of its ability to keep its adjudication process, and the results obtained therefrom - a secret, under one subterfuge or another. Secrecy, the hallmark of the VA's " plague infested " claim system can never permit light, to invade the hidden recesses of its sqalid claims adjudication system.

The American people would be outraged, if they only knew how veterans were mistreated and victimized by the process.

Further, if they only knew of the

helpless feeling of betrayal, lawyerless veterans experience after being denied valid claims, without a meaningful hearing addressing their evidence. A process which denies them the right to subpoena or cross examine witnesses or to obtain competent medical experts to resolve differences in medical opinion, or to seriously challenge VA decisions as being unconstitutional under Maroszan, Johnson v Robison and Goldberg v Kelly, 397 U.S. 254 (1970).

Never in our history have so many been abused by bureaucrats, whose victims, have so little recourse, with the public kept " barefoot and pregnant" under a such a malevolent conspiracy of silence.

The U.S. Supreme Court in a famous pornograpy case (citation omitted) said that while it couldn't describe pornography in specific legal terms, it knew it, when it saw it. So too, veterans who have been routinely abused by the VA

know when their Constitutional rights have been violated, although they may not be competent to describe the infringement in strictly legal terms.

III Review Requested of the Supreme Court

Petitioner asks only that this Court allow him to enter the U.S. District Court in Brooklyn, therein to present the evidence, pursuant to a class action suit to establish once for all the unconstitutionality of the VA claims adjudication system.

At the present time no attorney will take the case unless that person is assured it will be meaningfully heard.

Other cases, brought strictly in conformance with Johnson and Marozsan, and not seeking adjudication of claims, were summarily dimissed re: [12(b)(6)] on the grounds that such cases were brought in the guise of a constitutional complaint.

Notwithstanding the 7th Circuit's

opinion in Maroszan, the 2nd Circuit holds a different view, at variance with Johnson which clearly establishes a conflict between the two circuits which this Court should review to maintain uniformity among the circuits.

IV Conclusion

In summary, petitioner asks only for permission to litigate a veterans right to a fair and impartial hearing and the evidence pertaining thereto. Otherwise, the petitioner shall have no alternative but to bring a RICO, CIVIL RIGHTS or BIVENS action against his own government, something he is most reluctant to participate in - even though, a New York jury would be far more receptive to the plight of veterans than a judge might be.

Thank you for any consideration extended to disabled veterans.

Dated: February 19, 1993

New York, N.Y.

Respectfully submitted,

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APPENDICES

Appendix -A

pages

Decisions To Be Reviewed

CAFC order dismissing Appellant's Combined Petition for Rehearing In Banc. (11/25/92) A-1,2

CAFC panel decision dismissing Appellant's Brief A 3-13

CVA denial of combined petition for reconsideration and review. A14,15

APPENDIX B

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1ST & FIFTH Amendments	B-1
38 U.S.C. sect 211 (a) [511 (a)]	B-2
38 U.S.C. 3402 (a) (2)	B-2
28 U.S.C. 455	B-2,3
FRCP rule 56	B-4
Veterans Judicial Review Act (VJRA) or Public Law 100-687 or 38 U.S.C.	B-5-7

Appendix - C (virtually all of the following originate from Congresional Hearings)

Witness/ Affiliation	Subject	Pages
BVA Chairman Preferential Signature List	Equal protection	C-1-4
R. O'Dell VP. VVA	Identical Cases Decided Differently, Courtesy Signatures	C-5-10
R. O'Dell VP. VVA	BVA Allowance Aberration	C-9,10
R. O'Dell VP. VVA	Due Process Courtesy Signature	C-10,11
R. O'Dell VP. VVA	Better to deny than allow	C-12-15
P. Cushman Pres.VDP	Due Process	C-16-21
G. Erspamer Attorney NARS	VA Destruction of Court Ordered Documents	C-22-26
Mcallister Wash. Post	Harrassment of " Deep Throat"	C-27-31
R. Abrams VA Emp.	Due Process White Paper	C-32-39

Witness/ Affiliation	Subject	Pages
Gompf Letter VA Director	Blackmail Due Process Equal Protection	C-40-43
J.N. Magill Director,VFW	Intimidated by Gompf letter	C-44-46
Dr.A.Pellerin BVA Emp.	Due Process Implausible decisions, no retroactive payment, trash outside medical opinions, conscience stricken testimony, intimidation.	C-47-55
J.L. Blum CBO	Veterans would increase allowances by 33%,if independent medical expert opinions were allowed	C-56,57
T.A. Verrill Adj. Officer	Vets denied hearings at critical stages of the VARO adjudication process	C58,59
K. Eaton BVA Chmn.	BVA hearings covertly denied, subject to quota.	C-60-65
4 Members of Congress	Letter to Wash. Post Blackmail of NVSO's, inter alia	C-66-69
K. Blaylock Pres.AFGE	Due Process, inconsistent and uncontrolled decionmaking, no effective check on impermissable actions	C-70-75

Witness/ Affiliation	Subject	Pages
N. Johnson BVA Employee	Covert quota system, shelve notions of due process, decisions based on race, close decisions always went against veterans, dirty tricks.	C-76-84
D. Schwab National Officer,VFW	Due Process. Many service officers' increasingly disappointed over denial of cases which have considerable merit.	C-85-93
S. Cooper VDP	Equal Protection - Miss. receives twice the national average in benefits.	C-94-97
Kenneth Eaton BVA Chairman	Statistics, evidencing virtually no change in allowance rates - suggesting a quota	C-98-101
B. McAllister Wash Post	New Court(COVA) gives preference to VA.	C-102,03
BVA Members	Informal Grievance Production Quota, Courtesy signatures Due Process	C104-110
R.O.Muller Pres. VVA	No uniformity of decisionmaking	C-111-115
Chief Member, BVA Panel	Shopping for Judges Intimidation of panel by BVA Chairman	C-116-118

Witness/ Affiliation	Subject	Pages
A. Bernklau	BVA Statement	C-119
BVA Opinion	Hearing,4/4/90	C-120
A.Bernklau	CVA Brief	C-121,22
A. Bernklau	CVA Brief Doctor's Statements	C-123,24
BVA Chairman, Eaton	Ltr. to Bernklau via Barbara Bush	C-125
CVA, Chief Judge Nebeker	D.A.V. Interview	C-126
CVA Decision re: Recusal	Aronson v Brown	C-127

Order upon Petition for Rehearing and Suggestion for Rehearing in Banc (United States Court of Appeals for the Federal Circuit, November 25, 1992):

"United States Court of Appeals

for the Federal Circuit

92-7038

ARTHUR N. BERNKLAU

Claimant-Appellant,

v.

EDWARD J. DERWINSKI, Secretary

of Veterans Affairs,

Respondent-Appellee.

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to

the circuit judges who are in rugular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on December 2, 1992.

FOR THE COURT

FRANCIS X. GINDHART, CLERK

Dated: November 25, 1992

By _____

Diane M. Frye

Chief Deputy Clerk

DECISION UPON APPEAL: (United States Court of Appeals for the Federal Circuit 92-7038, October 9, 1992):

United States Court of Appeals

for the Federal Circuit

92-7038

ARTHUR N. BERNKLAU,

Claimant-Appellant

v.

EDWARD J. DERWINSKI, Secretary

of Veterans Affairs,

Respondent-Appellee.

DECIDED: October 9, 1992

Before MICHEL, Circuit Judge, SKELTON, Senior Circuit Judge, and Clevenger, Circuit Judge.

PER CURIAM.

Arthur N. Bernklau appeals to this court from a decision of the United States Court

of Veterans Appeals ("CVA") that vacated and remanded an April 4, 1990 Board of Veterans Appeals' ("BVA") decision denying appellant's claim for entitlement to a total disability rating. Because we lack jurisdiction on several of the issues, we dismiss-in-part, and otherwise affirm-in-part.

Mr. Bernklau served in the Armed Forces from July, 1954 to June, 1955. After his retirement, the Veterans Administration ("VA") determined that Mr. Bernklau was entitled to a disability rating due to a service-connected lower back injury. Mr. Bernklau's disability rating was initially set at ten percent in 1956, and through a series of appeals and remands, the rating was finally increased to a level of seventy percent in an August 8, 1989 decision of the BVA, retroactive to November 3, 1983. At that time, the BVA

again remanded the disability rating to the VA to determine whether Mr. Bernklau was unemployable by reason of service-connected disability and, therefore, entitled to a total disability rating.

On September 5, 1989, the regional office of the VA denied Mr. Bernklau's claim for a total disability rating. This issue was certified for appeal to the BVA. In a decision dated April 4, 1990, the BVA affirmed the VA's decision holding that "[Mr. Bernklau's] service-connected [lower back] disability does not render him unemployable or unable to obtain or retain [sedentary] employment in a field of endeavor for which he is qualified." Docket No. 87-26 401, at 6. Mr. Bernklau appealed this denial to the CVA.

On appeal, Mr. Bernklau variously moved for sanctions against the Secretary of Veterans Affairs and censure of the VA.

The CVA denied these motions on October 24, 1991. The Secretary moved that the CVA vacate and remand the BVA's decision, which it did on February 14, 1992, stating that "the reasons or bases contained in the [BVA's] decision are not 'clear enough to permit effective judicial review.'" Bernklau v. Derwinski, No. 90-637 (Vet. App. Feb. 14, 1992) (order vacating and remanding) (quoting Gilbert v. Derwinski, 1 Vet. App. 49, 57 (1990)). The CVA also found that it was without jurisdiction to hear Mr. Bernklau's claim for retroactive compensation for higher disability ratings because the issue was not properly before the BVA at the time of its April 4, 1990 decision. The CVA entered judgment on March 23, 1992 after denying Mr. Bernklau's motion for reconsideration, or in the alternative, for review en banc. 2 Vet. App. 341 (1992).

Mr. Bernklau's appeal of the CVA's decision to vacate and remand the BVA's disability determination raises several jurisdictional issues. The jurisdiction of the court is "limited to those subjects encompassed within a statutory grant of jurisdiction." Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982). Jurisdiction of this court to review judgments of the United States Court of Veterans Appeals is governed by 38 U.S.C.A. § 7292 (West 1991), which reads, in pertinent part:

(d)(1) The Court of appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The [Federal Circuit] shall hold unlawful and set aside any regulation or any interpretation thereof (other than a

determination as to a factual matter) that was relied upon in the decision of the [CVA] that the [Federal Circuit] finds to be--

> (A) arbitrary, capricious, and [an] abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
>
> (D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the [Federal Circuit] may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as

applied to the facts of a particular case. (emphasis added). See Livingston v. Derwinski, 959 F.2d 224, 226 (Fed. Cir. 1992).

Mr. Bernklau contends that the CVA's remand to the BVA is improper because the CVA either had no factual basis on which to support its remand, or altogether misinterpreted the pertinent facts. We do not reach the merits of this issue. The BVA is required to provide a statement of the "reasons or bases for [its] findings and conclusions . . . ." 38 U.S.C.A. § 7104 (d) (1) (West 1991). In holding that the BVA's "reasons and bases" were not "clear enough to permit effective judicial review," the CVA determined that the BVA's opinion failed to meet the statutory requirements of section 7104. Thus, Mr. Bernklau challenges the application of a law to the specific facts before the CVA.

We therefore lack jurisdiction to consider this issue. 38 U.S.C.A. § 7292(d)(2)(B).

The same is true for Mr. Bernklau's contention that the CVA incorrectly found itself without jurisdiction to hear Mr. Bernklau's claim for retroactive compensation because the issue was not properly before the BVA at the time of its April 4, 1990 decision. Issues not before the BVA may not be considered by the CVA. Branham v. Derwinski, 1 Vet. App. 93, 94 (1990). Whether or not the issue of retroactive compensation was before the BVA on April 4, 1990 is a factual determination on which the CVA relied in drawing its conclusion. We are therefore without jurisdiction to review this issue. 38 U.S.C.A. § 7292 (d) (2) (A).

Mr. Bernklau also argues that the CVA erred as a matter of law in denying his motions for the imposition of sanctions

upon the Secretary of Veterans Affairs. The CVA's decision not to impose such a penalty, however, clearly rests on its application of law to the factual record. Thus, we are without jurisdiction to hear this issue. 38 U.S.C.A. § 7292(d).

Mr. Bernklau further argues that the CVA erred as a matter of law in denying his motion for summary judgment in view of the "well documented facts." Whether a motion for summary judgment should have been granted is a question of law. However, because consideration of Mr. Bernklau's motion requires an analysis of the factual background of the motion, we lack jurisdiction over this issue. 38 U.S.C.A. § 7292(d).

We also reject the other grounds upon which Mr. Bernklau appeals. His contentions that the Veterans' Judicial Review Act, Pub. L. No. 100-67, 102 Stat.

4105 (1988), is unconstitutional were not raised before the CVA and therefore need not be entertained on appeal. Wallace v. Department of Air Force, 879 F.2d 829, 832 (Fed. Cir. 1989). In any event, this court has sustained the constitutionality of that Act. See, e.g., Nagac v. Derwinski, 933 F.2d 990, 990 (Fed. Cir.), cert. denied, 112 S. Ct. 384 (1991); Belarmino v. Derwinski, 931 F.2d 1543, 1544 (Fed. Cir. 1991). Mr. Bernklau's other contentions (among them that the Honorable Donald Ivers must be disqualified to sit on any CVA case, and that it is improper for VA attorneys to be housed in the same building as the CVA) wholly lacks merit.

For the above reasons, we dismiss those parts of Mr. Bernklau's appeal over which we lack jurisdiction, and otherwise affirm

the judgment of the United States Court of Veterans Appeals.

No costs.

DISMISSED-IN-PART and AFFIRMED-IN-PART

ORDER upon motion for reconsideration or, in the alternative for review en banc (NO. 90-637, MARCH 23, 1992)

"UNITED STATES COURT OF VETERANS APPEALS"

NO. 90-637

ARTHUR N. BERNKLAU, Appellant,

VA File No. 19 024 516

v.

EDWARD J. DERWINSKI,
Secretary of Veterans Affairs, Appellee.

Before NEBEKER*, Chief Judge, and KRAMER*, FARLEY, MANKIN*, HOLDAWAY, IVERS, and STEINBERG, Associate Judges.

O R D E R

On February 14, 1992, a three-judge panel of the Court granted the Secretary of Veterans Affairs' (Secretary) motion for remand. Accordingly, the decision of the

Board of Veterans' Appeals (Board) was vacated and the case remanded for proceedings consistent with the Secretary's motion. On February 26, 1992, appellant filed a motion for reconsideration or, in the alternative, for review en banc.

Upon consideration of appellant's motion for reconsideration by the panel, it is

ORDERED that the motion for reconsideration is denied.

Upon consideration of appellant's alternative motion for review en banc, by the full court, it is

ORDERED that, no judge having called for a vote, appellant's motion for review en banc is denied.

DATED: MAR 23, 1992 PER CURIAM

CONSTITUTION

First Amendment:

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for redress of just grievances."

Fifth Amendment:

> "No person shall be held to answer for a capital, or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES

38 U.S.C. §3402(a)(2) (1979):
[NOW: 38 U.S.C § 5902(a)(2)]:

"The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized."

38 U.S.C. §211(a) (1979)
[NOW: 38 U.S.C § 511(a)]:

"On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

28 U.S.C. §455(a), (b), and (e)

"(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which

impartiality might reasonably be questioned.

"(b) He shall also disqualify himself in the following circumstances:

"(1) Where he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

"(4) He knows that he, individually ***** has a financial interest (legal or equitable interest, however small) in the subject matter in controversy ***** or any other interest that could be substantially affected by the outcome of the proceeding;

"(5) He *****

> "(iv) is to the judges knowledge likely to be a material witness in the proceeding.

"(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is proceeded by a full disclosure on the record of the basis for disqualification."

(emphasis added)

FEDERAL RULES OF CIVIL PROCEDURES (FRCP)
Rule # 56

The judgment sought shall be rendered forthwith . . . " If there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue on the amount of damages."

VJRA (Public Law 100- 687) or 38 U.S.C. (Applicable Statutes)

38 U.S.C. sec. 4051

The VJRA precludes CVA review of final BVA decisions unless Claimant has filed a Notice of Disagreement on or after November 18, 1988.

38 U.S.C. sec.4055

" The principal office of the Court of Veterans Appeals shall be in the District of Columbia, but the Court may sit any place within the United States."

To date: CVA sits only in Wash. D.C.

38 U.S.C. sec 4061

" The times and places of sessions of the Court of Veteran Appeals shall be prescribed by the chief judge. "

38 U.S.C. sec. 4092 (a)

" The VJRA provides the U.S. Court of Appeals for the Federal Circuit, an existing Article III court, that sits in Washington, D.C. with exclusive jurisdiction to hear appeals of CVA decisions."

38 U.S.C. sec 4092 (d) (1)

" The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any staute or regulation or any interpretation thereof(other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be-

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

" (C) In excess of statutory jurisdiction, authority, or limitations or in violation of statutory right; or

" (D) without observance of procedure required by law."

" (2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination or (B) a challenge to a law or regulation as applied to the facts of a particular case. "

(emphasis added)

38 U.S.C. 5404 (c)(1)

[formerly 3404 (c)(1)]

" A fee may not be charged, allowed or paid for services of agents and attorneys with respect to services provided before the date in which the Board of Veterans' Appeals first makes a final decision in the case. Such a fee may be charged, allowed or paid in the case of services provided after such date only if an agent or attorney has been retained with respect to such case before the end of the one year period beginning on that date. This limitation ....does not apply to services provided with respect to proceedings before a court."

note: BVA final decisions may not take place for years.

PERSONAL SIGNATURE LIST" OF CHAIRMAN KENNETH E. EATON, BOARD OF VETERANS APPEALS:

"Office of the Chairman
Board of Veterans Appeals
Washington, D.C. 20420

March 9, 1987

"MEMORANDUM
No. 01-87-10

Subj: **Chairman's Personal Signature List**

1. PROCEDURE

When the following persons have **expressed an interest** in a case, and correspondence is being directed to the Capitol Hill offices, the case, after

processing through AIRS and prior to dating and dispatch of correspondence **will be routed through the Chairman's office** to the Executive Assistant **for review and signature**. Where a letter is being sent to the district offices, it should not be sent to the Executive Assistant but rather should be signed by the Chief of the Section preparing the correspondence, e.g., Chief, Special Correspondence and Inquiries Section; Chief, Hearing Section.

2. COMPOSITION

The Chairman's personal signature list will be composed of the following Senators and Congressmen.

Senators

Alan Cranston, Chairman

Senate Veterans' Affairs Committee

Frank H. Murkowski

Alan K. Simpson

Mark O. Hatfield

Thomas A. Daschle

CONGRESSMEN

G.V. Montgomery, Chairman, House Veterans' Affairs Committee

Gerald B. H. Solomon

John Paul Hammerschmidt

Jim Wright, Speaker of the House

Denny Smith

Douglas Applegate

Don Edwards

3. RECISSION

a. Chairman's Memorandum No. 01-85-24, dated September 27, 1985, subject:

Chairman's Personal Signature List, is hereby rescinded.

b. This memorandum is automatically rescinded December 31, 1987.

KENNETH E. EATON

Chairman"

{BOLD PRINT EMPHASIS ADDED}

STATEMENT PRESENTED BY RICHARD E. O'DELL, VICE PRESIDENT AND CHAIRMAN OF COMMITTEE ON ADVOCACY, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, ENTITLED: "VA APPELLATE ADJUDICATIONS AT THE BOARD OF VETERANS APPEALS", BEFORE THE HOUSE OF REPRESENTATIVES, HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HEARING CONCERNING "OVERSIGHT OF VA'S DISABILITY COMPENSATION PROGRAMS". HEARING BOOK PAGES 95 THROUGH 195.

{***** Statement page 5}

"Significant Variances

Between Different Sections

of the BVA

"Kenneth E. Eaton, Chairman of the Board of Veterans Appeals, testified at an

oversight hearing on the operation of the BVA before the Subcommittee on Compensation, Pension and Insurance of the House Committee on Veterans Affairs in 1985 and again on October 6, 1987. Mr. Eaton, responded to a question from Chairman Applegate in 1985 by saying "[y]es, indeed, it is quite true that there is what I might say is a significant variance between different sections of the Board and how they see these cases. . . ". The VVA and the American Legion have each, in the past, pointed out similar problems (Exhibit C, footnote 3 {***** **omitted**})

During the 1985 and 1987 hearings when Mr. Eaton testified, it would have been very helpful if production statistics for each of the 21 sections of the BVA had been available. These production statistics show allowance rates, denial rates and remand rates for each of the

Board's 21 sections. Had they been available they would likely have shown substantial differences in allowance rates, denial rates and remand rates between certain sections of the Board that handle similar cases.

"The VVA has obtained one such document from sources within the BVA and, indeed the differences we have suspected are apparent. Allowances overall for the last quarter of FY 1987 for all Board sections ranged between 7.9 percent and 18.6 percent. Denials overall for the same quarter ranged between 55.6 percent and 82 percent. Remands ranged between 6.9 percent and 31.6 percent (Exhibit D {***** **omitted**}). The VVA believes the variations in these production statistics show that the testimony of the Chairman of the BVA regarding the "significant variances between different sections of

the Board is indeed very significant. It is so significant, in our judgment, that it has become apparent that a higher reviewing authority ought to be made available on this basis alone in order to protect veterans from those "variances" in the decisions rendered on veterans benefits.

Moreover, not only are there variances in the decisions of the Board's sections, but equal and even identical cases are decided differently (Exhibit C, pg. 7 {***** **omitted**}). This fact, attested to the BVA Chairman, stands in direct violation of federal regulation, 38 CFR 3.101 (Exhibit E {***** **omitted**})."

*****

{Statement page 11} "An interesting corralary to the production credit limits in cases involving multiple issues is the

affect additional credits in individual cases might have on overall BVA allowance rates. Over many years the BVA annually has approved about 13 percent of the appeals adjudicated. This rate has remained so constant over the years that it has come to be termed "the quota" in some circles. If production credits were given for each issue decided in each case by the BVA, it is likely that allowance rates would decline precipitously as denials soared.

Indeed the VA's Veterans Appeals Control and Locator System (VACOLS) which provides statistical information on allowances and denials "is blind to the reasoning behind any individual decision. If, in a four issue appeal, three issues are denied and one issue is allowed, the VACOLS record will regard the BVA decision

as an allowance." (Exhibit L, pg 2 -{***** omitted}).

Moreover, if it is conservatively estimated that the typical appeal at the BVA contains three issues and if it is assumed that two of the three are disallowed, the annual allowance rate would decline two thirds from approximately 13 percent to 4.3 percent. *****

{***** Statement page 15}

"Courtesy Sign-Offs

"Another potential byproduct of production pressure and bonus incentives is particularly troubling. This is the practice of some Board members in signing off on a claim decision without even reviewing the file. The danger for veterans is one of being denied due

process as prescribed by the laws governing the way appeals are supposed to be adjudicated.

"The May 11, 1987 Informal Grievance cited earlier in this statement (Exhibit J, pg 2 {***** omitted}) discusses courtesy sign-offs as follows: "Another, and perhaps the most serious manipulative method of exploiting the current system is by obtaining signatures on decisions by Board Members (or Acting Board Members) who sign the decisions despite not having reviewed the case. This so-called 'courtesy' system not only deprives claimants from a review to which they would otherwise be entitled, but is also used to artifically increase the production of decisions. We need not identify those sections that regularly engage in this practice because their

identity is well known to the Deputy Vice Chairmen who review their decisions.

"With regard to the same system of 'courtesies' any section member can give an 'in house courtesy' signature, thereby accomplishing the same result as obtaining a 'courtesy' signature outside the section. All that is required are cooperative Board Members who are mainly motivated by monetary awards rather than concern for proper adjudication of claims.

"The undersigned are of the opinion that the pressures to meet goals or quotas (or even to increase allowance rates) are illegal."

"We find it particularly troubling that the "courtesy" is frequently exercised by the physician member." *****

{Statement page 21} "The writer goes on to say "[a]ll promotions, bonuses and other rewards are based almost exclusively on productivity, with only lip service being paid to quality. Sections are in competition with each other for a yearly bonus, which is paid to the sections with the highest productivity over the year, with the largest share going to the Chief Member. This encourages the Chief Member of each section to focus on getting the cases out, so to speak, regardless of quality or whether a fair result is reached in the case or not. (The Chief Member of the section I was in at the time of my retirement, although a decent person overall, did not view favorably my dissents in favor of the veteran or other claimant, which he felt slowed down the productivity of the section and impaired his chances for the yearly bonus . . . It is my belief, based on my 20 years'

experience with the BVA, that the agency is not discharging its duties and responsibilities toward the veterans of this nation and their survivors, in the spirit which Congress intended and that judicial review of BVA decisions, and lifting of the $10 limitation on attorneys' fees, would greatly benefit veterans and other claimants for Veterans Administration benefits. In my judgment, the Vice Chairman and most board members, whether law members or medical members, have an anti-claimant orientation, and little sympathy for the veterans' benefits program, which they view as a huge give-away. This view colors the decisions they reach on the cases before them. (Soon after I became a board member, I was called in by the Vice-Chairman, as a result of a dispute I was having with the Deputy Vice Chairman, in charge of one-half of the board to which my section was

assigned, and was told by the Vice Chairman that I was too allowance-prone, and that it was preferable to deny a case, when it doubt, than to allow it, as a denial always had a chance of being reversed later, whereas an allowance was final.) . . . Most board members, in my judgment, pay only lip service to the and regulations, disregarding those with which they are not in sympathy in order to reach the result they favor in the particular case . . . Some of the most anti-veteran, pro-denial Chief Members, with the lowest allowance statistics year after year, end up getting the largest bonus year after year, based on their production statistics."

{EMPHASIS ADDED}

ANONYMOUS "DEEP THROAT" TYPE LETTER RECEIVED BY MR. GORDON P. ERSPAMER (LEAD NARS ATTORNEY IN NARS V. WALTERS -- CASE NO. C-83-1861-MHP, N.D. CALIFORNIA). SAID LETTER WAS SUBMITTED AS "EXHIBIT E" (SEE HEARING BOOK PAGES 310 THROUGH 312) IN THE PREPARED STATEMENT (SEE HEARING BOOK PAGES 292 THROUGH 326) OF PHILIP E. CUSHMAN, PRESIDENT, VETERANS DUE PROCESS, INC. (VDP), BEFORE A JUNE 25, 1986, HEARING OF THE COMMITTEE ON VETERANS' AFFAIRS, HOUSE OF REPRESENTATIVES, NINETY-NINTH CONGRESS, SECOND SESSION, HEARING BOOK VOLUME II, SERIAL NO. 99-54

"May 29, 1986

"Gordon Erspamer, J.D.

NARS Advisory Board

78 El Camino Real

Berkley, CA 94705

Dear Mr. Erspamer:

"Your statement before the House Veterans Affairs Committee on May 20, 1986, was accurate and true. The Veterans Administration does not systematically provide veterans with adequate due process, especially for those claims disallowed for failure to submit requested evidence. Instead, those who manage adjudicative actions encourage premature denial of claims without notice in order to statistically enhance the data that measures the timeliness of claims processing. Managers of adjudication receive work credit for the volume of cases produced. If for example, end product controls are prematurely cancelled or recorded, the same credit can be received for working one claim four times

as for working four claims. These managers are then rewarded by both additional staffing and monetary bonuses under merit pay.

Your prepared statement includes a memorandum (Exhibit A) from T.A. Verrill, Adjudication Officer at the V.A. Regional Office, San Francisco. Mr. Verrill has been repeatedly warned by Central Office about encouraging his staff to prematurely disallow claims before addressing the issues claimed and was forced to appear in court to defend his policy of discouraging hearings to claimants. Central Office has chosen to ignore these repeated offenses and has in fact rewarded him with an exceptional evaluation and a bonus under merit pay. This award was fully concurred in and encouraged by officials at Central Office.

In many instances, this office, as well as some other offices, including: Washington Regional Office, St. Petersburg, Philadelphia, Baltimore, Los Angeles, and Winston Salem have been found to repeatedly "administratively" deny claims without proper processing. In many instances, a copy of the development letter requesting evidence is never placed in file, yet the claimant is disallowed for not replying to the request. Often, the evidence was not actually requested. This type of failure is considered only procedural in nature and is not counted as a substantive error against the station. On several occassions this was brought to the attention of the Compensation and Pension Director. In addition, there have been instances when several items of evidence have been requested. If some, but not all, of the evidence requested is

received, some stations will disallow the claim without notice for failure to submit requested evidence. Confirmation of these facts can be found by making a Freedom of Information (FOIA) request to Central Office to obtain from the Compensation and Pension Field Operations Section, a summary of the quality review and the specific claim numbers for cases involving error codes 15, 33, 52a and 54. These are maintained in the station quality review file as well as the station general operating file. The information regarding type of errors is also maintained on a personal computer by the Systematic Quality Control (SQC) section of Field Operations.

Both the regional office claims examiners and rating board specialists are often required to process 20 or more final actions daily. This means a person must

process more that {sic} two cases per hour. The number is left up to the management of each regional office.

In order to operate with reduced staffing, many regional offices no longer employ full time doctors for the rating board. Instead a part-time doctor is borrowed from a local medical center one to two times a week to sign his name to the accumulated rating decisions. He may spend one minute or less on each decision. This information can be confirmed by requesting the performance standards for regional office employees to include Claims Examiners, GS-9-11 and Rating Specialists GS-12. Information regarding regional office staffing in the adjudication division can be obtained from the Compensation and Pension Service at VA Central Office."

{EMPHASIS ADDED}

"DEEP THROAT" LETTER #2, RECEIVED BY MR. GORDON ERSPAMER, LEAD ATTORNEY IN NARS V. TURNAGE (CASE# C-83-1861-MHP), CONCERNING INTERROGATORIES SENT TO THE VETERANS ADMINISTRATION PURSUANT TO SAID ACTION. (NOTE: THIS LETTER PROVIDED BASIS FOR COURT INVESTIGATION RE DESTRUCTION OF DUE PROCESS DOCUMENTS REQUIRED UNDER COURT ORDER. SAID INVESTIGATION RESULTED IN FINES TO THE VA OF $120,000., REQUIRED COURT APPOINTMENT OF A SPECIAL MASTER TO ENSURE COMPLIANCE WITH FUTURE COURT ORDERS)

"July 11, 1986

"Gordon Erspamer, J.D.

NARS Advisory Board

78 El Camino Real

Berkeley, CA 94705

Dear Mr. Erspamer:

"Your interrogatories recently sent to the Veterans Administration have been received. You are heading in the right direction. However, there is a conspiracy by the supervisors of the Field Operations Staff in the Compensation and Pension Service to deny you the information requested. If you do not specifically name the correct form or record, they intend to indicate they have no record.

You should ask for specific error exceptions called. These are held for 2 years and are contained on form 20-6567a-21. A copy of the form along with a sample is enclosed. You should ask for any and all exception sheets that contain errors under the specific error codes your interrogarory {sic} requested. The SQC history file contains these exception sheets for all stations. The sheets

contain the name of the office, the name of the veteran and the claim number of the veteran. There is also a series of letters written to stations which document specific errors in due process and case control. You may wish to ask for all error sheets and letters concerning due process and case (claims) control for as far back as these errors have been kept.

Approximately 2 weeks ago, Michael Dunlap, the supervisor of Field Operations, ordered the consultants to purge the station files of derogatory information about the stations as well as the Adjudication Officers. Included in the purge was information received from San Francisco Regional Office employees about T.A. Verrill, Adjudication Officer of that office. The staff consultants of the Field Operations Staff purged the files. However, you may ask for station

visit reports and station history files. The periodic station analysis are held in the official station history files for 2 years and held indefinitely in the unofficial brown history file. You should request both station visit reports and staff analyses for 8 stations since January 1982 to present. These records along with SQC records are also maintained at each regional office.

It should be also noted that a legal consultant, Ronald Abrams, wrote several papers on due process problems found at field stations that have been given to the Director of Compensation and Pension Serivce {sic}, Gerald P. Moore. These should be requested. In addition, Ronald Abrams wrote a memorandum to Gerald Moore indicating a serious due process problem and Central Office failure to take the problem seriously. This memorandum was

destroyed by Michael Dunlap, the supervisor of the Field Operations Staff without being forwarded to the Director of the Service. Mr. Moore did indicate to a consultant, Mr. John Smith, who is now the Adjudication officer at the Hartford, CT Regional Office, that on the staff visit to Washington Regional Office, no due process problems should be identified.

You may wish to request the performance standards for each Adjudication Officer. You will note that there is no uniformity in the performance standards. This means that each office has its own quality standard. The Adjudication Officer is not responsible to any central authority, but to his own station director."

{EMPHASIS ADDED}

WASHINGTON POST NEWSPAPER ARTICLE CONCERNING VA HARASSMENT OF "DEEP THROAT", WRITTEN BY STAFF WRITER BILL McALLISTER, DATED APRIL 24, 1990

"Harassment Claim at VA Supported

"An internal Department of Veterans Affairs- investigation has supported allegations that a VA supervisor harassed a worker who had warned a federal judge that department officials were destroying records in a highly sensitive lawsuit.

The finding by one of the department's Equal Employment Opportunity investigators is of the type that VA officials have said could trigger additional sanctions, such as contempt of court proceedings, for the department from U.S. District Judge Marilyn Hall Patel of San Francisco.

Three years ago, the judge levied a $120,000 fine for the wholesale destruction of records, needed in a lawsuit over the treatment of veterans exposed to radiation during atomic bomb tests. In addition, she warned VA officials not to harass any workers who had cooperated with the investigation of the records destruction. VA officials have told supervisors that "any adverse employment action" taken against a cooperating worker could subject the supervisor to contempt proceedings.

The fine and warning from Patel followed testimony by Barry S. Boskovich, a staff consultant in the VA's central office, who said that records in the case were being destroyed and that some VA officials were not cooperating fully with lawyers' requests for documents.

Boskovich has testified that his actions made him unpopular at the VA, and last September he complained to Equal Employment Opportunity officials there that his annual evaluation had been lowered by a supervisor in retaliation for his actions in the lawsuit.

EEO investigator Shed Robinson Jr. said in a report submitted in February to the department's compensation and pension service that Boskovich "established a prima facie case of discrimination." Robinson said it was likely that Ted Spindle, Boskovich's supervisor, had discriminated against Boskovich because of his testimony in the records case. He recommended a finding in favor of Boskovich.

Spindle denied retaliating against Boskovich, but he did tell the investigator that he kept a separate file

on Boskovich's work and that he believed Boskovich "was neglecting his duties as a result of his obsession" with the San Francisco case. Spindle declined to comment.

After receiving Robinson's report, VA officials ordered a second investigation. That report was completed last month, but it was inconclusive and basically told VA officials they would have to resolve the dispute.

Veterans Affairs Secretary Edward J. Derwinski described the Boskovich allegations as "a serious matter" in a letter to Congress earlier this year and promised he would investigate. His action came after the chairmen of the House and Senate veterans affairs committees and the House panel's ranking Democrat declared they "would be dismayed" if Boskovich was being harassed. The members of

Congress noted that Don L. Ivers, the VA's general counsel, had assured them there would be no retaliation against workers who testified about the destruction of records.

Don Smith, a VA spokesman, said yesterday it will be up to officials in Boskovich's section to attempt to resolve the matter. If Boskovich is unhappy with their offers, he can appeal the matter directly to Derwinski or to the Equal Employment Opportunity Commission for a hearing by an administrative law judge, Smith said.

As far as VA officials know, the matter has not been communicated to Judge Patel, the spokesman said.

The judge has yet to rule in the long-pending lawsuit involving veterans who were exposed to radiation during the tests." **(EMPHASIS ADDED)**

VETERANS ADMINISTRATION INTERNAL MEMORANDUM, WRITTEN BY RONALD B. ABRAMS, VA LEGAL CONSULTANT, CONCERNING DOCUMENTATION OF "DUE PROCESS" PROBLEMS, AND THE NARS V. WALTERS LAWSUIT (CASE # C-83-1861-MHP, PENDING, N.D. CALIFORNIA)

"VA VETERANS ADMINISTRATION

Date: 9/25/86

From: Ronald B. Abrams, Legal Consultant

Subj: Documentation of Due Process/NARS v.Walters/Analysis/Suggested Actions

To: Director, Compensation and Pension Service (21)

THRU: Assistant Director Adjudication Procedures

THRU: Chief, Project Staff

*****{NUMBERED PARAGRAPHS 1-13 OMITTED}

"14. Mr. Erspamer will try to prove that our adjudication process systematically denies procedural due process. He will argue that our system is unfair and counteractive. He will contend that our management evaluation system emphasizes productivity and timeliness to such an extent that our managers are encouraged to violate the due process rights of our claimants.

15. Mr. Erspamer can show that it is in the best interest of our managers to have their people do, as quickly as they can, as many cases as possible. He can also show that adjudication duties dealing with

the fairness of the adjudication process such as: control of claims, supervisory review of old claims, thorough development, recognition of all issues, providing adequate notice, documenting that notice was given, and careful quality review, tend to adversely affect gross productivity and timeliness statistics.

16. Because central office does not require its regional offices to validate their local quality review, Mr. Erspamer will contend that it is in the best interest of some of our managers to deny or ignore the due process rights of their claimants. He will argue that because due process procedures increase the time it takes to adjudicate a claim, thereby slowing production, it is not in the best financial interest of our managers to

follow our regulations and directives dealing with due process.

17. Mr. Erspamer can show that a managers' bonus and merit pay evaluation is based in part on the adjudication division's productivity. He will state that our system encourages some adjudication managers to report incorrect quality levels because they know that their failure to do this part of their job will not be held against them. If Mr. Erspamer can show that our system pits the financial interest of adjudication officers against the fair and reasonable treatment of our claimants, he would be well on his way to proving the VA does have an unfair, adversarial claims adjudication system.

18. Mr. Erspamer has obtained reports identifying regional offices that prematurely denied claims without notice so that credit for completed work could be taken (Baltimore). He has survey trip reports and white papers documenting that certain stations: ignored claims (Phoenix), established and cancelled controls improperly (Baltimore, Hartford, San Francisco, WRO), discouraged complete development (Baltimore), ignored or didn't emphasize documentation of due process and carelessly performed local quality review (many regional offices).

19. The way to win this case is to distance the Compensation and Pension service, The Department of Veterans Benefits and the Veterans Administration from the people who, to improve their performance evaluations, abused our claims

processing system and violated the rights of our claimants. I strongly suggest you, as Director of our Service, take appropriate administrative action against supervisors who, for whatever reason, encouraged or knowingly permitted the gross violation of the constitutional rights of claimants.

*****{NUMBERED PARAGRAPHS 20 AND 21 OMITTED} 22. We cannot defend the actions taken by some regional office and central office supervisors and win this case. Mr. Erspamer will present evidence tending to show the adjudication process is unreasonable and unfair. If we down play in Court, violations of VA rules by VA supervisors regarding the fairness of adjudication claims processing, the plaintiffs will prevail.

23. The due process clause assures reasonable procedural protections, applicable to the fair determination of the particular issues presented in a given case. (See Plato v. Roudebush 397F.Supp. 1295, (1975).) If the Court finds that our claims processing system is unfair, because VA managers are knowingly permitted to violate VA regulations and directives, I predict a majority of the Court will search for and find the "law" to overturn our statute.

24. The best approach would be to describe the improper actions as anomalies and aberrations. Explain that we in Central Office, under your direction, have been investigating these matters for a period of time. Although proving these improprieties was difficult and time consuming, we now have enough evidence to

act. (See paragraph 18 supra.) Argue that our internal actions show the inherent systemic fairness of the VA adjudication process.

*****{NUMBERED PARAGRAPH 25 OMITTED} "26. This memorandum is confidential. Because of its sensitive nature, I request that you not show this to anyone. I especially request that this memorandum not be seen by anyone in Section 214."

RONALD B. ABRAMS"

{EMPHASIS ADDED}

LETTER BY GAIL A. GOMPF, DIRECTOR, VA INTERGOVERNMENTAL AFFAIRS, TO NATIONAL VETERANS ORGANIZATIONS, ETC., DATED JUNE 5, 1986. LETTER APPEARS IN SENATE COMMITTEE ON VETERANS' AFFAIRS HEARING BOOK #100-938 CONCERNING S.11: JUDICIAL REVIEW LEGISLATION, DATED APRIL 28, 1988, PAGES 477 THROUGH 487. SUBMITTED INTO SAID HEARING RECORD AS EXHIBIT "G", BY PHILIP E. CUSHMAN, NATIONAL PRESIDENT, VETERANS DUE PROCESS, INC.

"Office of Congressional
and Intergovernmental
Affairs
Washington DC 20420

Veterans
Administration

June 5, 1986

Mr. Jon A. Mangis
Director
Department of Veterans Affairs
General Services Building
700 Summer Street, NE
Suite 150
Salem, Oregon 97310-1270

Dear Mr. Mangis:

"In accordance with our desire to maintain close cooperation and liaison with state offices and private agencies serving our nation's veteran community, I am enclosing copies of topical discussion papers recently released by the Veterans Administration which I think will be of immediate interest to you.

"Each of these papers address important issues concerning the continued delivery

of VA health care, benefits and other services to veterans in the future. The immediate items of discussion and interest are:

***** {ITEM #1 OMITTED} "2. Judicial Review: An overview of VA's Position." ***** {remainder of text of letter omitted}

"Sincerely,

GAIL A. GOMPF
Director
Intergovernmental Affairs"

{EXCERPT FROM PAGE 5 OF:} "OVERVIEW OF VA'S POSITION ON JUDICIAL REVIEW

"Moreover, many special considerations currently extended to veterans service

organizations may have to be curtailed. The providing of VA space and facilities {pursuant to 38 U.S.C. 3402}, **informal access to adjudicatory personnel**, etc., could be affected by judicial oversight and increased representation by private attorneys." ***** {BALANCE OF "OVERVIEW" OMITTED}

{EMPHASIS ADDED}

LETTER DATED MAY 10, 1988, FROM JAMES N. MAGILL, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES, TO SENATOR ALAN CRANSTON, CHAIRMAN, COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, WHEREIN MR. MAGILL RESPONDED TO WRITTEN COMMITTEE QUESTIONS. LETTER APPEARS ON PAGE 682-683, OF SENATE HEARING BOOK 100-938, DATED APRIL 28, 1988, CONCERNING S.11: JUDICIAL REVIEW LEGISLATION {VA}

"VETERANS OF FOREIGN WARS OF THE UNITED STATES

OFFICE OF THE DIRECTOR

MAY 10, 1988

The Honorable Alan Cranston

Chairman

Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed the Veterans of Foreign Wars response to questions submitted by you with respect to testimony given during the recent Senate Veterans' Affairs Committee hearing on April 28, 1988.

With best wishes and kind regards, I am

Sincerely yours,

JAMES N. MAGILL, Director
National Legislative Service

"QUESTION 1. A. **Do you have any concern that if judicial review legislation is enacted, your organization will**

lose the office space and telephones now provided to you free of charge by the V.A.?

"RESPONSE 1. A. **Yes**. As you know, Title 38 of the United States Code provides that the Administrator of the Veterans Administration may, at his descretion {sic} and, should space be available, provide office and telephone services to the major veteran organizations in conjuction {sic} with the adjudication of VA claims. We, of course, would prefer Congress to mandate this space because of the invaluable service rendered by the major veterans service organizations.*****

{***** REMAINDER OF QUESTIONS AND ANSWERS OMITTED}

TESTIMONY OF DR. ALCIDE D. PELLERIN, SALEM, VA., BEFORE THE UNITED STATES SENATE, COMMITTEE ON VETERANS' AFFAIRS, NINETY-FIFTH CONGRESS, CONCERNING SENATE BILL 364: VA ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW ACT, ON SEPTEMBER 21, 1977, PAGE 454. ALSO APPEARING IN SAID HEARING BOOK AT PAGE 468, IS DR. PELLERIN'S "OUTSTANDING {VA} PERFORMANCE RATING AND SUSTAINED SUPERIOR PERFORMANCE AWARD" {OMITTED}

"Dr. Pellerin. Mr. Chairman, honorable members of the committee. Thank you for giving me the opportunity to testify in this worthy cause. Please bear with me if I appear stage frightened, because I am. This is understandable in view of the fact that I have been waiting 31 year for this moment.

I am Alcide D. Pellerin, doctor of medicine, Boston University of Medicine, class of 1939. The pertinent aspect of my curriculum vitae consists in VA employ as a disability evaluation specialist for 4 years at the regional office level, and for approximately 4 years as associate member of the Board of Veterans' Appeals here in Washington.

In cases where veterans have succeeded in breaking the VA legal barrier, the illegal barrier would be more appropriate, and had their cases docketed in Federal court, the BVA decisions were reversed in every instance. There must be more to it than mere coincidence.

Since time does not permit presenting an expose of all that is wrong with the VA, which would require several hours if not several days, I shall limit myself to presenting one outstanding case

of injustice and abuse of power on the part of the BVA.

The case is that of Frank X, who in 1948 sustained a crushing injury to his lower extremities necessitating amputation. The surgical intern reported that the amputation was at the junction of the middle and upper third of the femur.

The VA promptly rated the disability 30 percent. some 20-odd years later an X-ray of the hip showed the amputation to have been 3 inches below the hip. which rated a 60-percent disability.

The VA gave him his due 60-percent disability from the date of the X-ray. Frank appealed. claiming 60 percent from the date of discharge. The Board of Veterans' Appeals upheld the denial. He asked for reconsideration. and a panel of two sections again denied.

Frank again was able to get a second reconsideration, this time by a panel of three sections of which one was my section.

During deliberations the BVA contended that it was not guilty of an error in the assignment of 30 percent after discharge, and therefore the veteran was not entitled to a retroactive 60 percent. I argued that Frank was not guilty either, and that he should not be penalized for an error by the VA physician.

I further argued that the issue was not one of guilt and that guilt should not be a basis for adjudication. I pointed out that the statutes do not say that only when the BVA is guilty of making an erroneous decision, are the benefits to be made retroactive, but they state that any time a decision is clearly and

unmistakably erroneous, retroactive benefits are in order.

I dissented, but eventually gave in under duress as in many other cases. Frank, wherever you are, please forgive me for having taken part in robbing you of $40,000 of $50,000 in due benefits.

Two wrong things stand out like sore thumbs in this case. One, the arbitrary and capricious interpretation of the law; two **the abuse of power by the chairman of the BVA in dictating and imposing his will on the board members.**

Since the BVA is the last word, the veteran has to grin and bear, and regret that he hadn't defected or deserted.

During the next few minutes I would like to give you examples of some of the dirty tricks used by some VA personnel to

achieve the VA objective of denying claims. One is a case, a diagnosis of "athlete's foot" was made during an official exam. That was not to the liking of the reviewing chief who, I assume, wanted to serve his master well and at the same time feather his bed.

So he eradicated the diagnosis and created his very own diagnosis, "athlete's foot not found." The denial of the claim was sustained by the BVA. This, I can assure you, would never be allowed to happen in a court of law.

Two, in getting an independent medical expert opinion, the BVA typically utilizes a medical school staff member who is also on the staff of the VA hospital associated with the medical school, who is on some sort of a salary by the VA, and who according to my research had been a

regular VA employee for several years at some time or other in the past.

This "setup" inevitably constitutes conflict of interest, yet the medical expert's word is on "a par" with the divine word of God. In contrast, should the veteran submit an opinion from a board certified specialist, say from some institution like the Mayo or Lahey Clinic, the Arthritis Foundation or the Georgetown Medical Center, that opinion only serves to reopen his case, and is considered trash by the VA.

Not only does a court of law ban conflict of interest, it encourages the challenging and questioning of the expertise of an expert, which is the lifeblood of the legal system. One last case: When the so-called VA independent medical expert was confronted with a finding, in the service medical record,

that was favorable to the veteran, he defied the rule of evidence and ruled that the military doctors had made an erroneous finding.

Based on that medical expert's opinion, the BVA issued a denial; again in a court of law the BVA decision would surely be reversed.

In summary, the basic problem is one of uncontrolled, unchecked, incorrectable injustice to the veteran because of the dictatorial power of the BVA. This runs counter to our great American ideal of democracy, which abhors and denounces dictatorship, and to the Constitution, which guarantees justice in a court of law for every citizen.

Please, gentlemen, I beg you, make it possible for the veteran to get justice, and the only possible way to accomplish this is not in the VA kangaroo

courts but in the Federal courts, which should be open to the veteran, as to the nonveteran.

It is my understanding that even aliens now have access to the courts, If the veteran is not more deserving then he is at least as deserving as the nonveteran citizen or the noncitizen.

Senate bill 364 would take the VA out of its lofty ivory tower and bring it down into the realm of justice and fair play for the veteran.

I wish to thank you gentlemen for your patience and attention and hopefully for your understanding of the plight of the veteran.

Chairman Cranston. Thank you very much, Doctor."

{EMPHASIS ADDED}

EXCERPT FROM CONGRESSIONAL BUDGET OFFICE (CBO) "COST ESTIMATES", PROJECTING THE COSTS FROM ENACTMENT OF SENATE BILL 349: "VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT". SAID ESTIMATES APPROVED BY JAMES L. BLUM, ASSISTANT DIRECTOR FOR CBO BUDGET ANALYSIS DIVISION, APPEAR IN SENATE REPORT NO. 97-467, DATED JUNE 8, 1982, AT PAGES 56 THROUGH 61.

*****{PAGE 60} "It was assumed, based on a BVA estimate, that the rate at which cases are denied by BVA will drop from its present level of 70 percent to about 60 percent with the use of independent medical opinions (as authorized by section 108) and precedent decisions."

*****{PAGE 61 OF REPORT} "The VA estimate of the increase in the workload of the General Counsel's office assumes a denial rate in BVA decisions of 72 percent. BVA asserts, however, that the current denial rate is 70 percent and would decrease to 60 percent under the provisions of S.349. The lower denial rate will result in a lower number of appeals and, therefore, a smaller increase in the workload of the General Counsel's staff."

{EMPHASIS ADDED}

HANDWRITTEN LETTER BY T.A. VERRILL, ADJUDICATION OFFICER, SAN FRANCISCO VA REGIONAL OFFICE.

"Section Chiefs

"Although VAR 1103 **permits a hearing anytime on any issue, we do not have the resources to operate in this way**. Hearings should **follow** the statement of the case. Hearings are not to be scheduled before the SOC in all but the most unusual cases. **We can always explain why a hearing is not appropriate** at a particular stage in processing. In cases previously disallowed, the hearing process must be discouraged as a means of presenting new and material evidence. Personal history can be presented on VAF 21-4138 or affidavits. Recitation of facts already of record or new facts not tying the issue to service, e.g. a description of present symptoms, will not help the case. **I know**

you are aware of these points, but the appellant isn't.

To effect this change in policy, employees will obtain the initial of a Section Chief on all requests to 21 to schedule a hearing.

T.A. Verrill

ADJ. OFF."

{Emphasis added}

PORTION OF "REPORT" NO. 100-418 OF THE COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, DATED JULY 7, 1988, CONCERNING S.11: VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT. PORTION QUOTED APPEARS AT PAGE 45 OF REPORT.

"5. HEARINGS BEFORE TRAVEL BOARD SECTIONS"

"As discussed earlier under the heading "Shady Methods to Speed Claims Resolution," one of the drawbacks to the BVA being situated in one location -- in Washington, D.C.--is the lack of ability on the part of many veterans to attend personal hearings before the Board. This is particularly the case because of the BVA statistics showing that allowances are statistically far more frequent after

personal appearances before the Board in Washington (19.5% in FY 87) and after appearances before a traveling section (30.6% in FY 87). In a general effort to permit an opportunity for more personalized appearances to those who are unable to travel to Washington, D.C., the BVA utilizes two alternative methods. Under the first, the BVA authorizes VA Regional Office adjudication personnel to act as agents for the BVA and, in that capacity, to conduct appellate hearings at Regional offices. The transcripts of these hearings are then sent to the BVA for a decision by a Board panel. Although this does not provide an opportunity for a hearing, the Committee is concerned that it is clearly an inadequate substitute for having the decisionmakers see and hear the claimant and other witnesses. In response to questions from the Chairman, the BVA

Chairman testified at the June 16 hearing that there is no method for transmitting to the BVA any information about the hearing personnel's assessments of the credibility of the claimant or other witnesses.

The second alternative involves a BVA Section traveling to various Regional Offices and holding personal hearings for a certain number of days. Due to the limitation on resources, there are a limited number of travel Board hearings available. In FY 1987, 739 such hearings were held. At the Committee's hearing, the BVA Chairman testified that because of the limited number of such traveling Section hearings, the BVA did not routinely tell claimants about this option. Specifically, Mr. Eaton noted, "If you advertise that too much, you are

going to get more than you can handle". In this regard, the Committee notes that the form filled out by claimants to request an appeal to the BVA (Form 1-9) presents only two options to the claimant: One for a field hearing before Regional office personnel, as discussed above, and one for a hearing in Washington, D.C. There is no option presented for selecting a hearing before a traveling Board Section. According to Mr. Eaton, the traveling Board hearings are scheduled by giving veterans' service organizations a certain number of hearings, and allowing the service officers to designate who receives a hearing. When asked at the Committee's hearing why the veterans service organizations find it desirable to have hearings before the traveling Board Sections, Mr. Eaton replied:

"It is always better in any case to have a personal hearing before the people who are deciding. There are exceptions to that; but generally, if you have a good case and you have a witness who is at all credible, you are better off facing those Board members and telling them all about it. Those are the facts of life.

Not only are travel board allowances higher, but personal hearings in Washington are higher -- not as high as travel board -- but there is not as much selection in the Washington office as in the travel boards. But they do pick and choose.

They are only allowed a few cases on the travel board for each service organization. They can only have so many because there is only so much time available for the travel board to

hear those cases. So, they pick the best cases."

"When asked if there is a **quota**, Mr. Eaton replied, "In effect. It has to be that way."

The Committee believes strongly that this method of allocating hearings before traveling Board sections is contrary to the accepted notions of evenhandness, fairness, and justice in that every individual should have an **equal opportunity** to obtain the most beneficial process. Accordingly, the Committee bill contains a number of changes to the current scheme regarding notice about allocation of traveling Board hearings.***** {LAST PARAGRAPH OMITTED} {EMPHASIS ADDED}

"LETTER TO THE EDITOR" OF THE WASHINGTON POST, DATED JULY 1, 1986, WRITTEN BY 4 MEMBERS OF CONGRESS, REVEALING THAT VETERANS ARE DENIED EQUAL PROTECTION OF THE LAW, BY NOT BEING ALLOWED TO SUE THE VA, BUT THE VA IS SUING LARGE NUMBERS OF VETERANS. LETTER ALSO REVEALED THE VA BLACKMAIL OF THE VETERANS ORGANIZATIONS WHICH PROVIDE FREE REPRESENTATION TO VETERANS CONCERNING THEIR CLAIMS AGAINST THE VA, BY THREATENED SAID ORGANIZATIONS THAT THEIR "FREE OFFICE SPACE . . . TELEPHONE SERVICE . . . " ETC., BENEFITS, PROVIDED TO THEM NATIONALLY BY THE VA, "MAY HAVE TO BE CURTAILED/COULD BE AFFECTED" BY PASSAGE OF JUDICIAL REVIEW LEGISLATION.

"CONGRESS OF THE UNITED STATES

House of Representatives

Washington, DC 20515

July 1, 1986

Letter to the Editor
The Washington Post
1150 15th Street, NW
Washington, DC 20071

Dear Editor:

"Some opponents have taken issue with your support of H.R. 585, a bill to authorize court review of VA decisions and to allow veterans the right to counsel of their choice. As sponsors of the bill, permit us to address just a couple of points.

It is laudable that "as a matter of principle, the VA doesn't view itself as a prospective litigant with the veteran."

Unfortunately, that statement doesn't square with reality. In the past four years alone, the **VA has filed suit against more than 140,000 veterans**, for alleged benefit overpayments that average $570.

While litigating against these veterans, the VA says that the court can't even listen to the veteran's defense, arguing that current law precludes judicial review of any decision of law, regulation, or fact made by the VA.

Further, the VA's commitment to an "informal and cooperative system" must be called into question when the VA tells veterans' organizations that passage of judicial review legislation **will result in the loss of the free office space, furniture, and telephone service** [pursuant to 38 U.S.C. §3402 (a)(2)]

presently provided to these groups in VA regional offices." {*****Balance of letter omitted}

Sincerely,

DON EDWARDS
Ranking Majority Member
Veterans Affairs Committee

LANE EVANS
Chair, Vietnam-Era Veterans in Congress

THOMAS A. DASCHLE, Chairman
Subcommittee on Education, Training, and Employment, Veterans Affairs Committee

BOB EDGAR, Chairman
Subcommittee on Hospitals and Health Care, Veterans Affairs Committee"
{EMPHASIS ADDED}

STATEMENT OF KENNETH T. BLAYLOCK, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AT A HEARING BEFORE THE SUBCOMMITTEE ON SPECIAL INVESTIGATIONS OF THE COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES HOUSE OF REPRESENTATIVES, NINETY-SIXTH CONGRESS, SECOND SESSION, CONCERNING JUDICIAL REVIEW OF VETERANS CLAIMS, NOVEMBER 19, 1979. PAGE 330 OF HEARING BOOK.

"The American Federation of Government Employees, AFL-CIO, is pleased to have the opportunity to submit its views concerning legislation (H.R. 6181) providing, among other things, judicial review of certain final decisions of the Administrator of Veterans Affairs. AFGE represents over 700,000 personnel

throughout the federal government. **Within the Veterans Administration itself, AFGE holds some 248 exclusive units of recognition representing nearly 116,000 personnel**, including personnel in the Board of Veterans Appeals in the VA central office in Washington, D.C.

Yet we must also observe that **among our membership considerable dissatisfaction exists** concerning the lack of access to the courts on the part of veterans who wish to appeal final determinations concerning benefit and disability decisions made by the Veterans Administration. In effect, under current law, **veterans have been relegated to the status of second-class citizens** who are denied the same rights of judicial review available to most other

beneficiaries of federal entitlement programs.

In this regard, we note that a demonstrated need exists for the Veterans Administration to be subject to judicial accountability. We have seen figures which clearly indicate that the veteran making an appeal to the Bureau of Veterans Affairs (BVA) is under a serious disadvantage. Whereas appeals to the Social Security Administration are decided in favor of the claimant in two out of three cases, actual results support or favor the veterans claim in the BVA in only one out of ten cases.

AFGE recognizes that exact comparisons between these very different programs are difficult to make, but it appears to us as though large numbers of veterans have not received the benefit of reasonable doubt on any

consistent basis. The informality of the Veterans Administrations appeals procedure, combined with the absence of precedence in the disposition of cases, leaves wide discretion for inconsistent and uncontrolled decision making by the regional offices. In the absence of court review, there is no effective institutional check on arbitrary or impermissible action.

We do not mean to imply, however, that the dedicated career personnel in the Veterans Administration who are involved in the review process are not faithfully executing their duty to veterans and to the public. In fact, considering the budget squeeze on the agency over the past few years such personnel have done much to uphold the integrity of the review process. The Office of Management and

Budget has brought substantial pressure against government agencies to control outlays, and such pressure can easily translate into tougher guidelines and policies concerning various entitlement and spending programs, particularly when such policies are not subject to any outside review. The Veterans Administration, for example, has made several contracting-out decisions in recent years which we believe cannot be justified on grounds of cost-effectiveness or government efficiency and which have harmed the delivery of services to patients in the hospital system. In such instances, considerations of false economy have been placed above the needs of federal workers, taxpayers and the public.

Finally, we would also like to point out that in view of the numerous outstanding problems faced by today's

veterans, particularly by those who fought in Southeast Asia, it is imperative they feel they have received the benefit of full due process from the federal government. There has been much recent public concern about the plight of the "forgotten veterans." We believe that passage of legislation providing judicial review in the claims process will show Congress still cares."

{Emphasis added}

LETTER FROM NORMAN J. JOHNSON TO HON. ALAN CRANSTON, CHAIRMAN, COMMITTEE ON VETERANS' AFFAIRS, UNITED STATES SENATE, DATED OCTOBER 11, 1977, AS SAID LETTER APPEARS ON PAGE 786 IN SENATE HEARING BOOK CONCERNING SENATE BILL 364: "VA ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW ACT", NINETY-FIFTH CONGRESS, FIRST SESSION.

"STATE OF CONNECTICUT

DEPARTMENT ON AGING

90 WASHINGTON ST.

HARTFORD, CONNECTICUT 06115

Tel. 566-7725

WILLIAM R. RATCHFORD

Commissioner

October 11, 1977

"Honorable Alan Cranston, Chairman

United States Senate

Committee on Veterans' Affairs

Washington, D.C. 20510

Dear Senator Cranston:

"I was scheduled to testify on S. 364 last month but I could not make the personal arrangements necessary to do so. Similarly, I have not found the time to prepare elaborate written testimony. I do, however, have insights into the workings of the Board of Veterans' Appeals which I want to share with you and the members of the Committee.

I was a "staff legal advisor" to the Board of Veterans' Appeals for nine months in 1971-72. The "staff legal advisors" are the attorneys who actually write the Board's decisions, subject to review and ultimate approval of an appellate panel of two lawyers and one physician. I had previously practiced law for two years and the first thing I had to learn at the B.V.A. was to shelve my notions of professional objectivity and procedural due process.

Early on, I learned that there was a covert quota system in effect. Job performances of staff attorneys were rated by the number of decisions written in a given week. The fact of this quota system was always denied by the panel members and the front office; it was a well known fact to the staff attorneys. Each week a tally was circulated to all personnel showing the number of decisions produced by each attorney and the total for each of the dozen or more sections of the Board. There was clearly a competitiveness between sections and among the attorneys in any given section. One was expected to produce a minimum of six decisions a week and I was once cautioned by a panel member not to exceed one dozen per week so as not to drive up management expectations. I cannot believe that justice is accorded its due when the decision process is managed in such a way.

Inconsistency of decisions is a major shortcoming of the Board and its processes. A case might well be decided on unwritten principles peculiar to one section and originating in the isolated perspective of the panel chairman. (For example, my section would allow service connected status for the ear condition of tinnitus if it accompanied another ear disorder for which service connection was or could be established. Another appellate panel usually denied tinnitus claims when a veteran already had service connected status for an ear disorder. My panel's reasoning was that since tinnitus is a subjective condition, the existence of other ear disorders was the best evidence of it; otherwise tinnitus could not be established to exist. The other panel's reasoning, as explained to me, was that if a veteran was "service connected"

for one ear condition he was already getting his due.)

Discussions with other staff attorneys indicated that our respective panels interpreted statutes, regulations and precedent in haphazard patterns and dogmatically applied their peculiar unwritten formulas to the cases at hand. The fact that decisions were written by lawyers seemed more a function of bolstering the legitimacy of the process rather than one of actually conducting professional inquiries into the facts and applicable law of the cases.

Because cases were decided on differing grounds, and for reasons not contemplated by the laws and regulations, case decisions were haphazard, unfair and probably illegal. To be specific, in my section there was a practice of absolutely denying claims for service connections where the service departments could not

produce any medical records. This was not an infrequent problem, and surely many valid claims were refused on these grounds. To cover the situation and the embarrassment of the loss of the records, the opinion would recite something to the effect: "Service medical records do not indicate treatment for the claimed injury." Such evasion was common in cases where there were no records.

Another disturbing aspect of the appeals process and its freedom from outside review was the tendency to review a veteran's service records for indications of worthiness. A number of proffered decisions were reversed by the section because the facts were not overwhelming and the veterans' records showed infractions of military discipline, even minor ones. Again, the biases and individual standards of panel members

affected the decision - and they would differ from one section to the next.

On questions of permanent and total disability claims, my section was very tight. Where the facts were close, the decision always went against the veteran, although the statutes mandate a liberal interpretation. In one particular case I took an advocate's position because I was convinced of the merits of the veteran's disability claim. I urged consideration of the fact that the Social Security Administration had made a determination of disability. One of the section members dismissed that argument with the comment, "Those liberal b-----ds would give away the treasury." (My own previous experiences with Social Security disability claims had led me to the opposite conclusion.)

These experiences and criticisms may seem minor but I believe they illustrate

the dangers of the present closed review scheme of veterans' claims. Veterans deserve equal and fair treatment and they will not get it until the current scheme is opened to the review of an independent judicial process.

I want to leave you with one final example of B.V.A. attitudes: I once drafted and dictated an appeals decision granting service connection status for a black, Korean action veteran. The elements of the case were clear - His induction physical examination report indicated normal feet. The separation physical indicated "pes planus" or flat feet, not an unusual development over the course of Army service and one that can be painful and limiting for all of the jokes that are made of it. The facts and the law were clear, but the decision was returned to me with instructions to deny the claim.

I found it difficult to evade the letter of the law and I considered it dishonest to arbitrarily deny the facts in order to reach the decision my supervisor desired. I asked the section chairman why the decision was to be a denial. He explained that it was because the veteran was black and all black people eventually get flat feet. It was a "racial characteristic!" I now wonder how many decisions were written or decided by that man in his thirty-odd years with the Board of Veterans' Appeals?"

Sincerely yours,

Norman J. Johnson"

{Emphasis added}

STATEMENT OF DONALD H. SCHWAB, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS, AS A WITNESS AT A HEARING ON NOVEMBER 19, 1980, BEFORE THE SUBCOMMITTEE ON SPECIAL INVESTIGATIONS, OF THE COMMITTEE ON VETERANS' AFFAIRS, U.S. HOUSE OF REPRESENTATIVES, NINETY-SIXTH CONGRESS, SECOND SESSION, CONCERNING JUDICIAL REVIEW OF VETERANS' CLAIMS

"I will summarize a portion of my statement with the understanding it will be published in the record in full.

As this committee is aware, for more than 30 years the VFW has agonized with the judicial review problem. For a number of years we opposed judicial review by resolution, not always with unanimity but always by majority vote.

At our 80th national convention held in Dallas, Tex., in August 1979, our position changed in that the voting delegates rejected a resolution opposing judicial review and accepted a resolution after much debate and rewrite of the resolution to support judicial review.

In the legislation to provide judicial review of veterans' administrative claims decisions pertaining to matters of law and regulation, insofar as the merits of the claim are concerned, and review of the facts that are alleged to be arbitrary and/or capricious. Identical language is contained in our now current Resolution 680 passed by the voting delegates to our 81st national convention held in Chicago this past August.

You may wonder, Mr. Chairman, and rightly so after so many years, the

Veterans of Foreign Wars changed its position with respect to judicial review, and the following reasons are offered:

1. There are those who believe a system which permits welfare or supplemental security income recipients to seek court relief but denies the same forum to veterans is flawed.

2. Many Vietnam veterans are aware that the Veterans' Administration, in concert with the President's Office of Management and Budget, attempted in 1973 to rewrite the rating schedule to their advantage, believe the VA has been insensitive to their needs and are disenchanted believing that they have not received timely, full, fair, and impartial consideration of their appeals.

Claims of older veterans are often viewed with a jaundiced eye simply because they deferred filing. In the absence of

substantiating service medical records "buddy statements" by former prisoners of war and other knowledgeable witnesses are nearly always discounted as having been made from remote memory.

3. One of the most frequently heard complaints by our national officers in their travels is the complete frustration of those whose claims have been denied and due to the finality statute of 38 U.S.C. 211(a) are foreclosed from redress through court action.

4. Many service officers are increasingly disappointed in the denial of cases which they believe have considerable merit. Also, they wonder why, over the past 8 years, the percentage of cases allowed by the Board of Veterans' Appeals has fluctuated only a little over 2 percent whether that body considered 25,000 cases in the year or more than

35,000 cases. The average allowances have been 12.8 percent of cases considered. In the last 4 fiscal years, the variance has been only two-tenths of 1 percent in that allowances in 1976, 1977, and 1979 were 12.7 percent and in 1978, 12.5 percent, in 1980, 12.4 percent.

Restrictive language first surfaced some 93 years ago with passage of the Tucker Act in 1887 now encoded as 28 U.S.C. 1346(d). Note 536 of the annotation to this citation clearly reflects Congress' intention to prevent court review of pension claims.

Coupled with the foregoing and lending credence to administrative finality has been the historically held position of Congress and the courts that veterans' benefits are gratuities and not a right. President Eisenhower appointed

the Bradley Commission under Executive Order 10588.

You will recall that the Bradley Commission declared that military services is an obligation of citizenship and that veterans are not entitled to any more consideration than nonveterans. Thus the Commission joined the vociferous minority opposed to special consideration for veterans and provided a Roman holiday for an unfriendly press which applauded the courage of General Bradley and the Commission and proclaimed that at long last special consideration for veterans would be tossed out the window.

Thanks to the wisdom of Congress, this did not happen. In the Commission's report, the following language is set forth:

> The gratitude of the Nation to those who have served it in time of war is

fundamental in the whole concept of American veterans' benefits.This tends to place benefits in the category of a gratuity to which the recipient (the veteran) has no legal 'right', and which the giver (the government) has a legal right to withhold.

Mr. Chairman, while Veterans' Administration claimants' access to the Federal courts has been foreclosed, potential recipients of other Federal benefit programs took advantage of court decisions to elevate the status of their benefits from mere gratuities to the level of statutory entitlements with vested property interest.

This trend, which commenced in the 1960's. culminated in the landmark case of Goldberg v. Kelly, 397 U.S. 254 (1970), wherein the Supreme Court concluded that welfare benefits are matters of statutory

entitlements, more likely property interests than gratuities.

Mr. Chairman, it is a strange lesson in logic, indeed, that welfare recipients and those in the supplemental security income program enjoy the right to judicial review while our veterans, their dependents, and survivors are foreclosed from this same avenue.

If welfare benefits are not gratuities, the word has lost its meaning. Surely veterans' benefits are not gratuities notwithstanding repeated rhetoric to the contrary. No veteran has ever received anything for nothing. At the very least, those who have served honorably in uniform during periods of war and hostility have given years from their lives, their families, and their personal endeavors, if not their mental or physical health or their very lives.

This concludes my summary, and I will be happy to answer any questions you may have.

Mr. Leach. Thank you, Mr. Schwab. That was a very stimulating presentation." {Emphasis added}

EXCERPT CONCERNING "EQUAL PROTECTION" FROM PREPARED STATEMENT OF SIDNEY COOPER, NATIONAL LEGISLATIVE DIRECTOR, VETERANS DUE PROCESS, INC., BEFORE THE COMMITTEE ON VETERANS' AFFAIRS, HOUSE OF REPRESENTATIVES, ONE-HUNDREDTH CONGRESS, SECOND SESSION, ON SEPTEMBER 8, 1988, CONCERNING "JUDICIAL REVIEW OF VETERANS' AFFAIRS", HEARING BOOK SERIAL NO. 100-60, PAGE 412-445, FOLLOWING EXCERPT AT PAGE 439.

"Is Mississippi, the Promised Land of Veterans Benefits?

Inexplicably, the chance of obtaining service connected V.A. pensions in Mississippi and Arkansas appears to be twice as great as anywhere else in the U.S. Further, the average pensions granted

there are considerably higher too - 30% greater in Mississippi; 43% greater in Arkansas.

Non-service connected disabilities likewise fare extremely well: 2.3 X the national average in Mississippi; 1.9 X in Arkansas. Incredibly, there are 72% as many Non-Service connected claims in Mississippi as there are Service connected claims; in Arkansas, 60%. The national average is only 31% which means that Mississippians are either sicker or smarter than everyone else.

What explanation can there be for this blatant favoritism? Deference paid to veterans residing in Mississippi and Arkansas should come as no surprise to students of the V.A. and the House Veterans Affairs Committee (HVAC). Cong. G.V. Montgomery (D.Miss.) is the chairman of the HVAC while John Hammerschmidt (R.

Ark) was its ranking Republican member. Seniority and power obviously have an impact on what veterans receive and from which state.

How could such blatant favoritism take place without arousing the ire of the country? The awful truth is, that no one is watching the V.A. or analyzing its operations. Not the Congress; not the Press; not the Courts - not the States - not the NVSO's - not anyone!

Apparently, based upon the benefits dispensed in 1985, States such as California are being short changed $310 million, per year; Illinois, $204 million; Indiana, $70 million, whereas Mississippi and Arkansas are riding the "gravy train". No satisfactory explanation has been offered to explain such large pension descrepancies.

Mississippi has provided the armed forces with the lowest number of service men (92.1 per thousand) whereas the national average is 118.2 per thousand of population. Yet they receive more claims and higher per capita benefits. No wonder Cong. G.V. Montgomery says the system ain't broke! It does all right for Mississippi and Arkansas.

Accordingly, based upon the 1985 VA numbers, Mississippi is last in war but first in the hearts of the VA.

(Note: All numbers and relationships developed therefrom were extrapolations derived from the V.A. Fiscal Year, 1985 reports furnished the Congress)."

{EMPHASIS ADDED}

LETTER FROM KENNETH E. EATON, CHAIRMAN, BOARD OF VETERANS APPEALS (BVA), TO UNITED STATES SENATOR GARY HART, DATED JUNE 30, 1982, INDICATING AN 11.3% ALLOWANCE RATE IN APPEALS THAT REACHED THE BVA DURING THE 30 YEAR PERIOD 1952 THROUGH 1981, AND A 12.9% BVA ALLOWANCE RATE DURING THE 12 YEAR PERIOD, 1970 THROUGH 1981.

"Board of Veterans Appeals
Washington, D.C. 20420

"Veterans
Administration

June 30 1982

Honorable Gary Hart
United States Senate
Washington, DC

Dear Senator Hart:

"Your letter of June 11, 1982, was referred to the Board of Veterans Appeals (BVA) for an answer to the second question regarding cases appealed to the Veterans Administration.

We do not have complete statistics for 30 years. The best information we have:

- Appeals that reached the Board of Veterans Appeals - FY 1952-1981 (30 years):

  BVA decisions.....989,303

  Allowed by BVA.....111,338

- Appellate actions - FY 1970-1981 (12 years):

  Appeals initiated (Notices of Disagreement filed) 670,977

  Allowed in field offices.....111,401

  BVA decisions.....363,746

Allowed by BVA.....47,044

Allowed in field offices following Remand by BVA.....11,736

Combined allowances....170,181

I hope this information will be helpful.

Sincerely yours,

KENNETH E. EATON

Chairman"

{ON THIS PAGE, WOULD HAVE APPEARED A SINGLE PAGE OF VITAL BOARD OF VETERANS APPEALS STATISTICS (I.E. ALLOWANCE RATES, ETC.), SUMMARIZING A 10 (TEN) YEAR PERIOD. UNFORTUNATELY, SUPREME COURT FORMATTING RULES NECESSITATED 10 (TEN) PAGES TO SET FORTH THE IDENTICAL INFORMATION. CONSEQUENTLY, THE RESULTING PRESENTATION DEPARTED FROM THE BREVITY AND CLEARNESS CONTEMPLATED BY SUPREME COURT RULES, AND, ACCORDINGLY, IS OMITTED. SAID STATISTICS AVAILABLE UPON REQUEST}

EXCERPTS FROM WASHINGTON POST NEWSPAPER ARTICLE, BY STAFF WRITER BILL McALLISTER, DATED FEBRUARY 8, 1990, ENTITLED "THE FIRST FOOTPRINTS IN THE SAND --- NEW VETERANS' CLAIMS APPEAL COURT HOLDS INITIAL SESSION"

*****{PARAGRAPH 2} "It took years of debate and an act of Congress, but a new federal court-the first federal judiciary body to be created in 30 years-held its initial meeting yesterday to hear the claims of the nation's aggrieved veterans."

*****{PARAGRAPH 15} "The court located its offices at 1625 K Street NW, two blocks from the VA's central office and Nebeker (Chief Judge) has made clear that he wants a sharp line drawn between his court and the VA. When veterans ask about the

relationship, the judge said he responds, **"We do give them [the VA] preference, but we do correct their papers."**

{Emphasis added}

"INFORMAL GRIEVANCE", DATED MAY 11, 1987, FILED WITH THE CHAIRMAN OF THE BOARD OF VETERANS APPEALS (BVA), AND SIGNED BY SEVERAL INDIVIDUALS AT THE BVA. SAID GRIEVANCE WAS SUBMITTED AS AS A PART OF EXHIBIT "J" TO THE PREPARED STATEMENT OF RICHARD E. O'DELL, VICE PRESIDENT, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, AT A HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, ONE HUNDREDTH CONGRESS, SECOND SESSION. SAID VVA TESTIMONY APPEARS BETWEEN PAGES 95 AND 195 OF THE CONGRESSIONAL HEARING BOOK. EXHIBIT "J" WHICH, IN PART, APPEARS BELOW, IS ON PAGES 141 THROUGH 144.

"MAY 11, 1987

INFORMAL GRIEVANCE

"The undersigned, Members of the Board of Veterans Appeals, both individually and jointly, hereby present an informal Grievance against the Chairman of the Board of Veterans Appeals based upon a policy of awarding bonuses to various Board Members depending on the number of decisions produced in their individual sections.

Instead of providing a fair and impartial system of handling the number of appeals, the Chairman is engaging in acts, practices, policies and courses of conduct to pressure Board Members and Sections into increasing the number of cases being processed each year without regard to the amount of time that must be devoted to

each individual case in order to give it adequate legal and evidentiary consideration and in order to render a careful, correct, fair and impartial written decision consistent with the Members' obligation to treat each claimant in accordance with the requirements of due process.

*****{PARAGRAPH #5} "The current system rewards carelessness but penalizes diligence. Obviously, a section that produces the quota of 40 decisions per week spends at least one hour of time for each case. A number of sections have found that proper processing of this amount cannot be done and have fallen behind the weekly quota. On the other hand, for example, a section that produces 80 cases per week spends on the average only one half an hour on each case. It is

obvious that a one half hour review cannot be as complete as a one hour review. It is also apparent that the high producing section is rewarded for doing less work on each case. The record will show that on a number of occasions in the past, certain sections have processed more than 80 cases in a single week. We dispute any contention that under these circumstances, each case was given a thoughtful and thorough review by each Board Member.

*****{PARAGRAPH #7} "Another, and perhaps the most serious manipulative method of exploiting the current system is by obtaining signatures on decisions by Board Members (or Acting Board Members) who sign the decisions despite not having reviewed the case. This so-called "courtesy" system not only deprives our claimants from a review to which they would

otherwise be entitled, but is also used to artificially increase the production of decisions. We need not identify those sections that regularly engage in this practice because their identity is well known to the Deputy Vice Chairmen who review their decisions.

*****{PARAGRAPH #9} "With regard to the same system of "courtesies", any section member can give an "in house courtesy" signature, thereby accomplishing the same result as obtaining a "courtesy" signature outside the section. All that is required are cooperative Board Members who are mainly motivated by monetary awards rather than concern for proper adjudication of claims."

The undersigned are of the opinion that the pressures to meet goals or quotas (or

even to increase allowance rates) are illegal. In the case of Association of Administrative Law Judges, Inc., v. Heckler, 594 Fed Supp 1132, decided September 10, 1984, the Court observed that the Administrative Procedures Act contained a number of provisions to safeguard the decisional independence of ALJ's. They are exempted from performance appraisals to which other Civil Service employees are subject. ALJ's do not receive monetary awards or periodic step increases based on performance. (Emphasis supplied). Cases must be assigned, whenever possible, in rotation. (In that case, the Social Security Administration was pressuring the ALJ's because of excessive allowances.

*****{PARAGRAPH 16} "In summary, the undersigned, both individually and

jointly, are aggrieved by the system used by the Chairman to either grant or withhold monetary awards based on the number of decisions produced during the counting period. The grievance is based on the fact that the award system cannot be administered in a fair and impartial manner and the fact that the system is subject to abuse and manipulation of certain sections. The system penalizes those individuals who do more work, i.e., spend more time reviewing each case and rewards those who do less work on each case and who subvert the established review process by eliminating at least one review. With regard to the entire grievance procedure, the undersigned will exhaust all of its administrative remedies prior to taking any other action."

{EMPHASIS ADDED}

EXCERPT {PAGES 238 AND 239 OF HEARING BOOK} FROM THE STATEMENT OF ROBERT O. MULLER, PRESIDENT, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED JUNE 4, 1986, BEFORE THE HOUSE OF REPRESENTATIVES, COMMITTEE ON VETERANS AFFAIRS, CONCERNING H.R. 585: "JUDICIAL REVIEW OF VETERANS CLAIMS", NINETY-NINTH CONGRESS, SECOND SESSION. HEARING BOOK SERIAL NUMBER 99-52, VOLUME 1, PAGES 230 THROUGH 279.

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{Hearing Book page 238} 1. "VA Errors

Although the need for judicial review does not hinge on VA errors, it is beyond dispute that the VA sometimes makes erroneous decisions. Recent oversight hearings of the BVA makes this clear. For example, the following exchange took place

during these hearings between Congressman Applegate and Kenneth Eaton, Chairman of the Board of Veterans Appeals:

Mr. Applegate:

> Later on we will be receiving a comment from a witness about allowance rates from the various sections of the [BVA], and that perhaps some panels have consistently lower allowance rates than others . . . . Have you observed this and, if you have, do you have any comments about it.

Mr. Eaton:

> **Yes**, indeed, it is quite true that there is what I might say is a **significant variance between**

different sections of the Board and how they see these cases

. . . There are a couple of sections, or Board members, I suppose, who are rather low in their allowances. But, you know, you can't tell them what to do. . . .

Mr. Applegate:

You can have equal cases, identical, where one will get more than the others.

Mr. Eaton:

I'm afraid so.[2]

[2] Oversight Hearing on the Operation of the Board of Veterans Appeals: Hearing before the Subcommittee on Compensation, Pension, and Insurance of the House Committee on Veterans' Affairs, 99th

Also at these BVA oversight hearings, the American Legion testified that

> As an important part of our involvement with the issue of veterans suffering from post-traumatic stress disorder (PTSD), we have given special attention to reviewing the decisions of the Board of Veterans Appeals involving claims for service connection or an increased rating for PTSD. There have emerged from this on-going review several problems which have been brought to the attention of the Chairman of the Board of Appeals and

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Cong., 1st Sess. 10-11 (1985) (hereinafter "1985 House Hearings").

other VA officials without satisfactory resolution.

In our judgment **too many valid claims are being denied** by the regional offices, and the denials are subsequently confirmed by the Board of Veterans Appeals.[3]

VVA has observed this problem as well." {EMPHASIS ADDED}

[3] Id. at 40 (Statement of Philip R. Wilkerson, Assistant Director for Claims, National Veterans Affairs and Rehabilitation Commission, The American Legion).

EXCERPT FROM VA MEMORANDUM DATED JUNE 1, 1987, FROM THE CHIEF MEMBER, BOARD OF VETERANS APPEALS, TO THE VA DEPUTY ADMINISTRATOR, SUBJECT: "GRIEVANCE: INTERFERENCE WITH DECISIONAL INDEPENDENCE OF BOARD MEMBERS". SAID EXCERPT APPEARS AT PAGE 10 OF EXHIBIT "N", ATTATCHED TO STATEMENT PRESENTED BY RICHARD E. O'DELL, VICE PRESIDENT AND CHAIRMAN OF COMMITTEE ON ADVOCACY, VIETNAM VETERANS OF AMERICA, INC. (VVA), DATED FEBRUARY 18, 1988, BEFORE THE HOUSE OF REPRESENTATIVES, HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS. HEARING BOOK PAGE 180.

{***** VVA Exhibit "N", page 10} "4. Reversing Majority Decisions: On various

occasions, where the majority of the Board Members, either on an original or an expanded panel have voted to deny a claim, and there has been a request for an administrative allowance, the Chairman has allowed the claims. (See 38 U.S.C. 210(b) and 212(a); 38 C.F.R. 19.184) (See also {a portion of this sentence redacted}. Heretofore, the Chairman had intervened to allow only when the majority had requested an administrative allowance or where there was an expanded panel with an even split. This obviously represents an activist approach and is in derogation of the judicial independence of the Board Members.

5. Failing to assign expanded panels in an impartial manner: On a number of occasions, including a staff meeting on November 3, 1986, the Chairman admitted

that on various occasions, either where there has been a dissent or a request for a reconsideration, he has assigned another section on the basis of his expectation of what the outcome will be. This amounts to **"shopping for judges"** and has the effect of undermining the integrity of the Board.{***** Remainder of letter omitted}

{EMPHASIS ADDED}

Statement of Arthur Bernklau
Before BVA, 3/24/1988

A portion thereof follows from page 4:

2b) " The July 26, 1985 Cat-Scan and report were brought to the attention of Dr. Peter Altner (Northport VA hospital). Upon examination of the Cat-Scan, Dr Altner gave me a perfect verbal reading pointing out the disc herniations, fracture and spondylolisthesis; and then proceeded to write in my records " positive for disc degenerative disease only " When I asked him, " why he didn't write down what he told me ? " He replied: " I can't write down what I told you. It would make the whole orthopedic department look bad since we refused you a Cat Scan for 6 1/2 years and misdiagnosed you. ! "

" That brief encounter sums up the situation as much as anything could- but there's more, much more."

BVA Opinion,

or a portion thereof from

April 4 1990

" Several private physicians have given the opinion that the veteran's back disability is, by itself, so severe as to render him enemployable. We do not question the sincerity of those opinions. However, the clinical findings show nothing more than an inability to function in employment requiring the use of the back."

note: there were no other clinical findings other than those presented by Mr. Bernklau.

Appellant's Brief

before U.S. Court of Veterans Appeals

On the issue of a prior service injury, a portion thereof follows:

5) " The VA has argued until recently that the veteran had a prior service back injury despite Dr. Joseph G. Levack's, (the family physician) unchallenged notarized statement of 2/26/55:

" My records show no previous injuries other than a fractured nasal bone. At no time was there any complaint relating to his back. "

Moreover, the appellant's induction exam of 6/17/54 shows absolutely no evidence of a prior service injury. Item 38, of said examination clearly evidences that his " spine, other than musculoskeletal " portions of his body were normal.

As further evidence of the Army's belief that appellant was in top physical

(as continued from C-121)

condition, he was assigned to the Signal Corps and required to climb poles, which he successfully negotiated until the accident of November 19th, 1954.

Appellant was honorably separated from service June 24, 1955 with a service connected back injury which stands in sharp contrast to the physical induction examination which shows no back injury. Induction exam, 6/17/54, item # 38, shows a normal spine whereas the separation exam of 4/4/55, item # 38 shows an abnormal spine.

Consequently, the VA's continued assertion of a prior service injury until recently is inexcusable, unsupportable and a clear and unmistakable error in accordance with 38 CFR 3.105 (a). Further it is patently ludicrous.

Note: In all of the described instances, documentation was shown evidencing the factual accuracy of the above statements.

Appellant's Brief

(before Court of Veterans Appeals)

Excerpts thereof follow from several

Doctors Statements

1) **Dr. Bernard Jacobs** re Examination of 6/27/88

Diagnosis: " Post traumatic Spondylolisthesis, lumbar disc syndrome and compression fractures. "

Opinion: " In my opinion the patient's symptoms all emanate from his injury while in service. He is currently totally disabled and I believe this permanent. "

note: Dr. Jacobs was formerly the head of the orthopedic department of the VA's Bronx Kingsbridge hospital and later served as orthopedic consultant to the VA.

2) **Dr. Gabriel Ricciardi's** statement of 3/21/89.

Acknowledged that Appellant was a patient of his from 1973 - 1978, however: " .....

as of that time, he could be considered totally disabled. "

3) Dr. Anthony A. Lucella, re exam of 10/5/89:

Opinion: He is suffering from intervertebral disc sysndrome (herniated discs at L3/4, L4/5, and L5/S1), as well as severe 2nd degree spondylolisthesis L5/S1, residuals of a fracture at L2, and sciatic nerve involvement, which totally precludes him from seeking any gainful or marginal employment. "

4) Dr Guan Hiok Yu re exam of 10/4/89.

Opinion: " At the time of my examination , I doubt that he will ever be gainfully or even marginally employed. "

Note: At the time of the statement, Dr. Yu was employed by the VA.

Letter (5/1/90) from BVA Chairman Eaton

via Mrs Barbara Bush (First Lady) to

Arthur Bernklau, petitioner.

" In short, it is my opinion that the April 4, 1990 , appellate decision denying you entitlement to a total rating was based on sound legal, evidentiary and medical principles. That decision contained a Discussion and Evaluation section which should further assist you in understanding the reasons for a denial. I can assure you that your claim was carefully analyzed by the Board Members, so as to accord you every consideration, but that, ultimately their conclusions had to be consistent with the evidence and applicable law and regulations."

(emphasis added)

Chief Judge Nebeker's (CVA) Statement

Pursuant to an Interview Published in

DAV magazine of June, 1991

Excerpts therof:

DAV: What are you doing to address the large number of pro se cases ?

Nebeker: " It's rough, it's a problem. We didn't expect that so many veterans, two thirds of those before the Court, would be unrepresented."

" The VA has an appellate shop which is growing in experience and professionalism and the unrepresented veteran doesn't have a chance. ..... until we can beef up the representation of these folks, we've got a serious problem on our hands. "

" One reason is that with the $10 limit on lawyer's fees, there hasn't been any crossing of the threshold by lawyers. Also, bar associations have taken the position that veteran's law is such a highly technical specialty that lawyer's aren't competent to handle it. "

" I can appreciate that, Lord knows, I'm still getting acquainted with it. When I came to this Court I had zero understanding of the complexities and the regulatory administrative process that underlies the administration of veteran affairs."

C-127

United States Court of Veterans Appeals

No. 92-561

Samuel A. Aronson, Petitioner

V

Jesse Brown, Secy of Veterans' Affairs

Matter re:Recusalof CVA Judge Donald Ivers

Before a CVA Panel consisting of Chief

Chief Judge Nebeker, and Mankin and

Steinberg, Associate Judges.

Chief Judge Nebeker writing for CVA held :

" that, under 28 U.S.C. 455, the judges decision whether to recuse himself under the facts of this case, was the province of the individual judge and he is not subject to review within this court."

" Section 455 is a self enforcing statute; whether a reason exists in a case making it improper for a judge to participate in it is a decision confined to the conscience of that judge. "

" Moreover, section 455 includes no provision for the referral of the question of recusal to another judge. "

" Section 455 decisions should be made by a judge sitting in case; no provision is made in statute for transfer of issue to another judge. "

Supreme Court, U.S.
FILED
12
MAR 17 1993
OFFICE OF THE CLERK

No. 92-1381

RECEIVED
MAR 18 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR N. BERNKLAU

Petitioner,

v.

THE UNITED STATES OF AMERICA,
THE DEPARTMENT OF VETERANS AFFAIRS
AND JESSE BROWN, SECRETARY OF
VETERANS AFFAIRS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR VETERANS DUE PROCESS, INC., AMICUS CURIAE, IN SUPPORT OF THE PETITIONER, SUBMITTED PRIOR TO CONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI, WITH WRITTEN CONSENT OF ALL PARTIES

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INTEREST OF AMICUS

Counsel for both parties have consented to the filing of this amicus brief by Veterans Due Process (VDP) in support of the petitioner, Arthur N.Bernklau 92-1381. VDP is a 1983 grass roots organization, in the best of American traditions. The American Bar Association, the National Law Journal, Stars & Stripes, inter alia, have commended us for our work in behalf of veterans seeking judicial review.

VDP has testified on numerous occasions before the House and Senate Veterans Affairs Committees in the pursuit of judicial review. Moreover, we have supported legal actions in Marozsan v. United States, (at Appellate Level, In Banc), 852 F.2d 1469 (7th Cir. 1988) and Cooper v. United States, U.S. Supreme Court docket # 90-180, as an Amicus in support thereof, requesting the invalidation of 38 U.S.C. § 211(a), (the

no judicial review clause), as being unconstitutional, inter alia.

The stated goal of VDP is to secure "Due Process of Law" through judicial review and the unrestrained right to retain attorneys, for all disabled American veterans pursuant to their VA claims for compensation, medical care, etc.

VDP is particularly interested because substantial evidence was and continues to be developed, demonstrating that the VA uses "unpublished" practices and procedures to deny veterans fair and impartial hearings; and that such hearings result in "implausible" decisions which are later judicially "unreviewable".

Practices and procedures similar to those disclosed in numerous Social Security cases evidencing that adjudicators were rendering decisions contrary to the facts and their own professional opinions in deference to budgetary considerations. Such practices

and procedures' were roundly condemned by almost every Federal Court.[1]

It is vital to the interests of our nation, that such injustices, as disclosed in Tracy v. Gleason, 379 F.2d 469 (1967), Marozsan, Bernklau, Cooper - and other well documented cases, be remedied, else our ability to raise an army will be greatly impaired to the detriment of our national defense.

George Washington reminded the nation of its responsibility to veterans and its own well being, warning:

> "How the war veteran is perceived to be treated will directly affect the willingness of future generations to make those same sacrifices."

Failure to heed that warning can have catastrophic consequences for the

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1. Bowen v. City of New York, 476 U.S. 467 (1986); City of New York v. Heckler, 578 F.Supp. 1109 (1984); Schweiker v. Chilicky, 487 U.S. 412 (1987); McLean v. Heckler, 586 F.Supp. 1364 (1984); Mental Health Association of Minnesota v. Heckler, 720 F.2d 965 (1983); inter alia.

willingness of future generations to defend this nation - unless, of course, the enemy is at the front door - and then, of course, it may be too late.

SUMMARY ARGUMENT

In the most perfect of worlds, justice would be uniformly granted in a wise and compassionate manner. Unfortunately, none of us is privileged to live in such a world. All of us unfortunates, require the protection of laws, not men, to insure the blessings of freedom and liberty.

The original thirteen states knew this when they refused to adopt the Constitution unless it contained a Bill of Rights. That wisdom culminated with the adoption of rights which are now the cornerstone - of every single group of Americans, save one - the disabled American veteran. Why them?

Alone, among Americans - veterans, are powerless to redress bureaucratic wrongs

done them because of unwise, unjust and unconstitutional laws which deny meaningful access to court review of "implausible" decisions rendered solely for budgetary reasons.

Particularly, we owe a debt of gratitude to our veterans, many of whom served this nation, not always knowing precisely what the objective was, yet ready to die for their country and its principles.

Those thoughts were best expressed by the words of Dr. Randolph McKim, which were later engraved upon a memorial to the Confederate dead at the Arlington National Cemetery:

> "Not for fame or reward, not for place or rank, not lured by ambition or goaded by necessity, but in simple obedience to duty as they understood it, these men suffered all, sacrificed all, dared all and died."

How have we chosen to repay our disabled veterans? Not with the blessings of liberty and the constitution, but with indignity, humiliation and degradation

while their rights are trampled upon by an unbridled "dictatorship of the bureaucrat" armed, with a hidden agenda.

Where is it written that bureaucrats are imbued with such infinite wisdom and integrity that they must be obeyed without question? Where is it written that bureaucratic wisdom is "unreviewable" by the Courts? Where is it written that the concept of checks and balances are no longer valid? And where is it written that the protections afforded under the Bill of Rights applies to everyone but disabled veterans?

The undeniable answer is nowhere, except in the minds of Congress, but that doesn't make it constitutional, nor empower Congress to repeal either the law of common sense or the right to be meaningfully heard, due process, and equal protection as afforded to all Americans under the First and Fifth Amendments.

Common sense teaches that all power must never be placed in the hands of one individual, much less a bureaucracy, without reaping the consequences of such folly. History fully records what those consequences were, and what we will surely reap, if those same mistakes are repeated.

Ross Perot has been looking for hostages all over the known world and can't find any. Yet they are here by the tens of thousands, right under his nose, held hostage by the V.A. and improvident laws. Is it any wonder that the Courts and the American people know nothing about the largest scandal in our history? A conspiracy of silence either through ignorance or design has kept the "awful truth" from the American people.

An old adage has it: "when a scandal is large enough, there is no scandal". Similarly, who can forget the circumstances, under which, the Emperor had no clothes and none dared tell him.

Those same circumstances plague veterans today, a scandal so large that no one, save VDP, dare tell the "awful truth" to the American people or the courts.

Just as the jurisprudehtial concept of "separate but equal" could not withstand constitutional scrutiny once the facts were known, and reason prevailed (see: Brown v. Board of Education, 347 U.S. 483 (1954)), neither can an apartheid system of injustice, featuring "non-adversarial" decisions without meaningful judicial review survive constitutional examination.

Mr. Bernklau's writ details with some particularity his traumatic experiences while endeavoring to obtain compensation for injuries sustained while a member of our armed forces during the Korean war. His fight has continued for almost 40 years and remains to be won for all.

Nothing unusual about Bernklau's circumstances, VDP is aware of countless cases which were decided solely on the

basis of budgetary considerations irrespective of the merits. Although the facts overwhelmingly favored the veteran, the decisions to deny were "unreviewable". Other veterans organizations are similarly aware of numerous unfair decisions - but have chosen to remain silent, fearful of losing free rent and services given at the sole discretion of the VA Secretary under 38 U.S.C. § 3402(a)(2) [Now:§ 5902(a)(2)].

ARGUMENT

38 U.S.C. § 211(a) [now: § 511(a)] remains at the heart of any constitutional issue associated with the administration of veterans claims, despite the enactment of P.L. 100-687, The Judicial Review Act of 1988, and the alleged changes contained therein.

Said law continues de facto to preclude veterans from obtaining judicial review of claims decisions no matter how arbitrary or capricious, and continues de facto to

grant the VA unrestrained license to employ procedures devised specifically to deny veterans fair and impartial claims consideration.

Let us then examine what the controlling decisions held and then review how such decisions were applied (or misapplied) in the lower courts:

1. JOHNSON v ROBISON, 415 U.S.361(1974)

The seminal decision remains this Court's ruling in Johnson v. Robison, which held:

> "section 211(a) does not extend to actions challenging the constitutionality of veterans benefits legislation but is aimed at prohibiting review only of those decisions of law or fact arising in the administration of the statute..."
> (at 361)

Sec. 211(a), in pertinent part, provides:

> "....the decisions of the Administrator on any question of law or fact. . . shall be final and conclusive and that no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in mandamus or otherwise."
> (emphasis added)

Unlike many other laws enacted by Congress, § 211(a) is very explicit, and if, it were interpreted literally, the VA would have license to decide cases solely on the basis of race, creed, or color; in favor of veterans born only on Tuesdays, or any other basis it might choose - and no one, would have standing to challenge its decisions or the constitutionality thereof, irrespective of the circumstances.[2] Hence, major "creative" surgery was required since no law, no matter how explicit, could be interpreted to deny the Court's historic role in ruling on the constitutionality of legislation. Accordingly, the Johnson Court, in deference to Congress, decided to fashion a remedy to maintain the laws

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2. Judge Richard Posner of the 7th Circuit would describe §211(a), as being comparable to "Keep Off The Grass" signs - which if strictly observed, would lead to disastrous consequences.

constitutionality. It needed to be very "inventive", and it was.

First, it dismissed the government's contention that § 211(a) bars federal courts from deciding the constitutionality of veterans' benefits legislation, reasoning that:

> "such a construction would, of course, raise serious questions concerning the constitutionality of § 211(a)."(at 367)

Later, adding further emphasis to its view, this Court concluded:

> "Plainly no explicit provision of § 211(a) bars consideration of appellee's constitutional claims." (at 367)

The Johnson court reasoned that the appellee's constitutional challenge was to a decision of Congress, and not to the VA Administrator, thereby fitting neatly within the parameters of what Congress had written. That simple construction rendered the law constitutional while appearing to retain the sanctity of the "no review" clause. Admittedly, a brilliant stroke of judicial legerdemain.

At this point, the Court had devised a tenuous rationale for § 211(a)'s constitutionality, but needed more, much more, and apparently found it in a VA document submitted to Congress in 1952, (22 Years earlier), which the Court somehow obtained during the course of its deliberations.

Facing an almost insurmountable task, the Johnson court strove mightily to justify the indefensible, explaining:

> "While the legislative history accompanying these precursor no review clauses is almost nonexistent, the Administrator, in a letter written in 1952 in connection with a revision of the clause under consideration by the subcommittee of the House Committee on Veterans Affairs, comprehensively explained the policies necessitating the no review clause and identified two primary purposes:
>
> > "1. to insure that veterans benefit claims will not burden the courts and the Veterans Administration with expensive and time consuming litigation, and "
> >
> > "2. to insure that the technical and complex determinations and applications of Veterans Administration policy connected

> with veterans' benefits will be adequately and uniformly made."
> (at pages 369, 370)

Regrettably, there is absolutely no evidence to suggest that the Johnson Court inquired into the relevancy in 1974, of the VA's 1952 statement of justification re the "judicial no review" clause, or whether it was ever relevant at any time.

Accordingly, let us now examine both policy justifications for the "no review" clause and see how faithful the VA was to the policies it alleged necessitated the "no review" clause.

Re: COURT OVERCROWDING

A Wisconsin Law Review article, written by Law Professor Marc Galanter, Volume 1988, reported on page 929 thereof:

> "In 1980, the VA was empowered to sue to collect debts without referring the matter to the Department of Justice. An Office of Debt Collection was established in 1982 to centralize control over debt collection activities. Filings increased astronomically, culminating in 1985 when 58,159 cases were filed - fully 21.3% of all civil cases in the federal district courts."

Although the VA pretends that it is solicitous of the Court's calendar overcrowding problems, it has hauled approximately 200,000 veterans into federal court in an endeavor to correct its own "unreviewable" mistakes.

One of the VA's "unreviewable" mistakes, resulted in the suicide of a highly decorated veteran of the Vietnam war, Sgt. Ronald Beck. Beck with two tours of duty, took his own life, leaving a wife and two children. His last words were: "I could fight the Viet Cong, but not the VA."

Sgt. Beck's fight with the VA had been going on for years pursuant to his 100% disability claim. But the straw which broke the camel's back occurred when the VA erroneously cut off all of his disability payments pursuant to an alleged overpayment claiming he owed $ 1798. Months and months went by and try as he might, nothing could cause the VA to correct its error. During all this time

he was represented by the Disabled American Veterans (DAV),

Finally, dead broke, totally disconsolate, and not wishing to become a burden to his family, he simply took his own life in the tool shed behind his home.

His death in 1984 created a furor in the Press and Congress which the VA couldn't ignore. Ten days after his death, the VA acknowledged its mistake and admitted that instead of him owing them $1798, it owed him approximately $ 10,000; and that instead of a 40% disability, he was entitled to a rating of 100%, something he had claimed for many years to no avail.[3]

It seems that once public attention is focused upon the VA's claim adjudication system, strange and miraculous things happen when the VA seeks to practice

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3. Mrs. Ronald Beck, a VDP member, remains in the fight to obtain justice in behalf of the disabled veterans.

damage control to prevent the unraveling of its "unreviewable mistake" process.

For example, the Beck case which had gone on for years without resolution (re 100% disability) suddenly, ten days after his death, the merits thereof became crystal clear. What had occurred to cause this amazing reversal in VA thinking? Light, the great disinfectant, purified the VA's decision making process, shedding new insight into the merits of Sgt. Beck's claim -- merits which were obvious from his claim's inception! Like Sgt. Beck said: "I could fight the Viet Cong but not the VA" (His last words, recorded on tape in the back of the tool shed).

Why couldn't Sgt. Beck, one of our most decorated combat soldiers, fight the VA? Simply because the Congress had stripped him of his constitutional right to litigate the merits of his claim, before a fair and impartial forum. In effect, rendering him powerless to correct a gross

injustice which, but for his well publicized death, would continue to remain unresolved.

Sgt. Beck was just another one of those nameless veterans caught up in Professor Galanter's statistics. Make no mistake, there were thousands more. The VA won't talk, but its employees will, if veterans are permitted to litigate the constitutionality of its practices and procedures in the District Courts.

Obviously, the VA couldn't care less about court calendar overcrowding, hauling veterans into the federal court in record numbers, occupying in 1985, 21.3% of all civil cases. This is an old VA ploy, using someone else's concerns to make its own case for maintaining the veil of secrecy over its Claims Operation process.

For example, in order to justify to Congress and the courts, the VA's long standing opposition to veterans having attorneys, it cried crocodile tears over

veterans having to share their awards with attorneys. Veterans simply reasoned they were losing, losing, losing, no matter what kind of a case they had; consequently believing that they were much better off receiving 70% of something - rather than 100% of nothing.

This Court should take exception to bureaucrats expressing their fears in the guise of other people's concerns. In one instance, concern for court overcrowding; in the other, for the veterans' pocketbook. Meanwhile their sole motive is to keep the "awful truth" from the American people.

Why should anyone accept the concept of "no review", when the VA is so prone to mistakes (if that's what they are), primarily because their decisions are "unreviewable"? And why should the VA be allowed to haul veterans into Court upon the slightest provocation, while veterans

can neither return the favor nor plead a defense, such as Sgt. Beck? Why?

Conventional wisdom dictates: "What's sauce for the goose, must likewise be sauce for the gander", or has expediency become our sole "raison d'être", causing us to abandon the Bill of Rights to self serving bureaucrats, etc.

Thomas Jefferson in a letter to James Madison wrote:

> "Any people which would willingly sacrifice a little bit of freedom for a little more safety, will lose both and deserve neither."

Then wouldn't it necessarily follow that any people willing to sacrifice judicial review for the sake of expediency be similarly impoverished and disadvantaged? Moreover, what does it profit society to gain expediency while it sacrifices the very principles upon which it became a great nation - and which, if continued, will eventually lead to its destruction one principle at a time.

Re: **Expensive and Time Consuming Litigation**

The V.A.'s professed concern against involving itself in expensive and time consuming litigation, likewise was not genuine - but merely, another of its contrived justifications for avoiding public scrutiny. If genuine, that concern could have been substantially mitigated by rendering plausible and fair decisions.

Additionally, very few attorneys would wish to waste their time bringing meritless cases while Rule 11 sanctions would apply to those who did.

Again, the VA's concern has never been for the Courts, but rather for its own public image - and the bad press it would receive in cases such as Tracey v. Gleason[4].

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4. See: Tracey v. Gleason in Bernklau Petition for Certiorari, at pages 16, 17.

How many more cases like Tracy could the VA stand before the public would demand change and bring an end to its "non adversarial" system of injustice!!?

Further, if the VA were truly concerned about expenses, wouldn't it do something to get some worthwhile results out of its $ 20 billion hospital program, which according to GAO reports lacks leadership and accountability in a 220,000 person operation -- a system which places the care and treatment of veterans secondary to its own parochial interests. This Court should read some GAO reports and newspaper accounts of how veterans are treated and find out how bad it is.

If the VA were truly concerned about costs, it could save billions in better health care at reduced cost. Raising the expense issue, is simply another disingenuous ploy to justify its

unwillingness to subject itself to public scrutiny.[5]

Voicing concern for the taxpayer's pocket book is but another smoke screen covering its genuine fear of the public's learning the "awful truth", which is at the core of its primary interests. No one should be deceived by the VA's self-serving declarations in behalf of the taxpayer's pocketbook and the court's welfare.

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5. Diane Sawyer reported on ABC's Prime Time Live program, (9/27/90), filming a paralyzed veteran going unfed for three days; VA doctors routinely failing to change their gloves, leading to much staph infection; nurses required to falsify medical records, inter alia.

Likewise, the Washington Post reported (5/14/91) veterans missing from their hospital beds, in some cases for years, later found dead on the hospital grounds. Inexplicably, the Hospital staff continued for a time to renew medical prescriptions, privilege status and diet for the missing patients, in an endeavor to hide their absence.

Re: Technical and Complex Determinations

(are uniformly made)

The VA's assertion that only it could make technical and complex medical decisions, whereas the Courts could not, is belied by the Congressional evidence detailed in Bernklau's Writ of Certiorari. That evidence clearly demonstrates that the VA isn't interested in making fact based and plausible decisions whether they're technical, complex or simple, obvious and straight forward. The VA's primary concern, as always, is to obey the Office of Management and Budget's (OMB) imperative of meeting budgetary requirements irrespective of any claim's merits. Failure to do so, could result in lost promotions, bonuses, perks, and other important considerations vital to a bureaucrats' welfare.

At this juncture it is important to briefly mention what some of that evidence was:

a) Ron Abrams, a high ranking VA employee, issued a White Paper (expose) to top VA management, detailing some of its due process problems, which were described as follows: 1) the VA has an "...unfair, adversarial claims adjudication system". 2) The VA "pits the financial interests of adjudication officers against the fair and reasonable treatment of our claimants". 3) veterans claims are prematurely denied without notice. 4) claims were not properly developed. 5) due process routinely ignored. 6) constitutional rights are systematically violated. (see: Bern.App: C 32-39).

The Abrams VA "White Paper", depicts what's inside the "belly of the beast", and tells this Court much of what it needs to know about the VA and its "plague infested" non adversarial system of

injustice - stripping bare the facade of deceit and pretense for all to see.

b) Dr. Alcide Pellerin, a VA employee for approximately ten years, testified before the Senate that he was coerced on numerous occasions by the BVA Chairman, into rendering decisions contrary to the facts and his professional opinion.[6]

c) BVA attorney Norman Johnson testified that racial considerations were often taken into account when making decisions. He was likewise required to write opinions contrary to the evidence and his professional opinion.[7]

d) An anonymous letter from a top VA employee, advising that medical decisions were being made at the rate of one per minute at some VA regional offices.[8]

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6. Bernklau Writ: Appendix: C 47-55.
7. Bernklau Writ: Appendix: C 76-84.
8. A later letter from the same anonymous VA employee, resulted in a San Francisco District Court, levying a $115,000 fine against the V.A. for destroying documents evidencing due process violations; and

e) Donald Schwab, a top VFW employee reported that large numbers of service officer's could not help wondering why so many obviously meritorious cases were being denied. (Bern. App: C 85-93)

f) Phil Wilkerson of the American Legion, likewise could not understand why so many meritorious cases were denied at Regional level only to be affirmed at BVA level. (Bernklau Appendix: C 115)

g) Grievance hearings demonstrated some BVA adjudicators dismay over having to decide 40-80 cases per week. Likewise, expressing substantial due process concerns over some members having to resort to courtesy decisions[9] in order to

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caused the appointment of a Special Master to insure that future documents requested were faithfully executed. (Bernklau App: C 21; C: 22-26)

9 "Courtesy decisions" is the practice of signing off on cases (always to deny) without having read the file or viewed the evidence, in order to meet production quotas of 40-80 cases per week. BVA adjudicators benefiting from courtesy

meet their case load quota. (Bern. App: C: 104-110)

h) Kenneth Blaylock, AFGE Union President (116,000 V.A. members) registered serious concern over impermissible actions leaving "wide discretion for inconsistent and uncontrolled decision making by the regional offices." Moreover, that there was "no institutional check" on the VA's practices. (Bern. App: C-73)

i) Inter alia, ad nauseum, ad infinitum.

With practices such as those described above, assuming the VA had the expertise to decide technical and complex medical claims better than the Courts, what difference would it make? Its cases are decided upon budgetary, not fact driven considerations, in which the merits

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decisions would later reciprocate by likewise issuing courtesy decisions.

thereof, play little or no role in its "unreviewable decisions".

Is it any wonder why VA bureaucrats will fight to the death to keep lawyers, judicial review, and anything else calculated to shed light upon its wretched claim system, to keep the "awful truth" from the American people. Nor is it any wonder why disabled veterans will keep fighting with every fibre of their being to insure that fairness and justice are fully restored. Veterans expect no more and will accept no less.

Re: Uniformity of Decisions

Decision uniformity is but another of the VA's justifications adopted by Johnson to support the necessity for the "no review" clause. Like the preceding erroneous justifications cited herein, it too is fatally flawed, totally lacking in candor, honesty and sincerity. Congress

and this court were entitled to the truth, but never received it from the V.A.

BVA Chairman Eaton's own testimony before Congress acknowledged that he couldn't get uniformity in the same building, on the same floor, or in the same office room, much less throughout the country. (Bernklau Appendix: C 113)

Inexplicably, since the V.A. never codified its cases, how could it allege to the Johnson Court that it had achieved even a small measure of uniformity? How indeed, could that laudatory goal have been accomplished in the absence of case codification?

The VA's compass was, and remains, clearly pointed in the direction of reduced ratings or outright denial of meritorious claims. Only in that sense could the term "uniformity" be applied to the V.A. - none other.

Re: Raising An Army/ National Security

A recurring theme, throughout the Johnson court's deliberations, as expressed, in its opinion, was the absolute imperative to raise an Army and provide for the national defense. VDP does not quarrel with that necessary requirement, but seriously questions how this nation is going to raise any army or engage in any draft of its youngsters, once its people learn the "awful truth" about how disabled veterans are treated.

Under the circumstances, if the importance of raising an Army is so vital to the nation's defense, then how can this court, or any court for that matter, refuse disabled veterans judicial review of evidence needed to establish constitutional abuse?

The fact is, that the Johnson holding, declaring § 211(a) constitutional was predicated on monstrous fabrications, upon

which this Court relied, resulting in a travesty of justice, whose rationale was based upon information gratuitously given by the VA, having absolutely no validity.

Johnson relied upon Congress; Congress upon the V.A.; and the V.A. relied upon outright lies, leaving veterans holding the bag, while justice took a holiday.

Johnson's rationale (decision) was fundamentally flawed and must be overturned and § 211(a) expunged from our laws while leaving the shameful record intact to guide future generations.

No amount of tinkering can fix it now. Try as you will, § 211(a) remains what it always was, unconstitutional on its face, and as applied. Common sense mandates that so much unbridled power must never again be placed in the hands of any official or agency, no matter how good their intentions may be. Such laws have no place in a democratic society, and must be resolutely struck down, lest the entire

body politic become infected with its deadly virus and the nation perish.

Re: Other Important Cases

While Johnson held that statutes could be constitutionally attacked under the "no review clause", later courts (since 1974) found in what they perceived as logical extensions of Johnson, that the VA's regulations could be constitutionally challenged and, further, that its practices and procedures could likewise be subjected to constitutional examination.

Wayne State v. Cleland, 590 F.2d, 627 (6th Cir. 1978) expanded Johnson and held that § 211(a) does not preclude challenges to the VA Administrator's authority to promulgate regulations.

Merged Area X v. Cleland, 604 F.2d, 1075, 1078 (8th Cir. 1979) followed Wayne State, ruling that § 211(a) "was not designed to preclude judicial review of a challenge to the Administrator's authority

to promulgate regulations..." Similarly, the case of Evergreen State College v. Cleland, 621 F.2d, 1002 (9th Cir. 1980), cited and followed Wayne State on the regulations issue.

In Dumas v. Cleland, 486 F. Supp. 149 (D. Vt. 1980), judicial review was extended to procedures when it held that § 211(a) does not bar judicial review of a claim that Veterans Administration's procedures violate due process.

The rationale of the Johnson v. Robison holding was further defined in Plato v. Roudebush 397 F. Supp. 1295 (D. Md. 1975), to permit review of VA hearing procedures. Plato held that the VA's failure to provide a pension recipient a "pretermination" hearing was a denial of plaintiff's due process rights and that § 211(a) does not preclude court review of the constitutionality of VA procedures. Plato has been relied on as a basis for jurisdiction in a number of subsequent

suits questioning the constitutionality of V.A. procedures.

Even before the Supreme Court decision in Johnson, Federal District Courts, relying on Goldberg v. Kelly, 397 U.S. 254 (1970), had assumed jurisdiction in suits challenging the constitutionality of Veterans Administration procedures. The Goldberg case did not involve veterans' benefits but its principles were generally applied to veterans' litigation.

The issue in Goldberg was whether the due process clause required the holding of an evidentiary hearing before terminating the continued receipt of welfare payments. The Supreme Court held that due process required a hearing prior to the termination of benefits.

The earliest of several unreported class action suits challenging the constitutionality of Veterans Administration procedures may be found in Wallace v. The Administrator of Veterans

Affairs, No. 14499 (D. Conn., filed December 23, 1974). In Wallace, the Court assumed jurisdiction on the grounds that an allegation of constitutional deprivation was a sufficient basis for jurisdiction.

The Wallace Court denied the Government's motion to dismiss for lack of jurisdiction pursuant to the prohibition contained in section § 211(a). The Court found that the plaintiff was not seeking review of the Administrator's decision but was, instead, seeking enforcement of his due process rights to notice and a hearing prior to any decision to modify or otherwise terminate his benefits. The Court concluded that the principles established in Goldberg v. Kelly were dispositive of questions presented in Wallace.

Chief Justice Rehnquist writing for the majority in Walters v. NARS, 473 U.S. 305, 311 at n. 3, (1985) reasoned:

> "Despite the general preclusion of judicial review with respect to benefit claims, this Court held in Johnson v. Robison, 415 U.S. 361 (1974), that the district courts have jurisdiction to entertain constitutional attacks on the operation of the claims system."

That opinion expressed by the Supreme Court in 1985 would appear to validate actions taken by those courts accepting jurisdiction in cases involving challenges to the constitutionality of legislation, regulations and procedures.

Moreover, said holding in NARS would appear to extend Johnson still further and to now encompass the entire VA claims system.

In 1988, along came Marozsan v. United States, (In Banc), 852 F.2d, 1469 (7th Cir. 1988) in which for the first time a court endeavored to extensively define Johnson by discussing most, if not all, of the constitutional questions presented by § 211(a). If Johnson was the seminal

case, then Marozsan is noteworthy for being its clearest expression.

The breadth of the Marozsan decision which held that the VA's practices and procedures are subject to judicial review, is best understood by the vigorous language employed by the 7th Circuit when rendering its opinion, which follow from the brief excerpts, as recorded below:

1) "Marozsan's allegation that the VA Administrator utilizes an arbitrary "quota system" requires constitutional analysis particularly within the competence of an independent judiciary." (at 1474)

2) "Courts.....must be equally reluctant to license free wheeling agencies to mete out their own brand of justice." (at 1477)

3) "It is axiomatic that Congress may not act unconstitutionally, nor may it delegate authority to executive agencies to do so." (at 1477, 1478)

4) "If the Court were to accept the government's position that 211(a) bars a review of Marozsan's claim ..... [that] would subvert the judiciary's function of providing a check against arbitrariness ... by Congress, the Executive, and their Administrative agents." (at 1478)

5) "To deny jurisdiction to claimants like Marozsan, would be to find that veterans simply have no forum in which to

pursue a claim that the VA violated the Constitution." (at 1478)

6) "A statute which precludes review of such obviously unconstitutional decisions must be just as unconstitutional as the underlying action of the [VA] Administrator. (at 1478)

{note: Referring to the VA's assertion that the courts lacked authority under 211(a) to review the constitutionality of VA decisions, if denied, solely on account of race, color or gender}

7) "An alleged arbitrary quota system that obviates the Administrator's need to consider the evidence is no mere detail, but a serious question of constitutional dimension." (at 1478)

8) "Marozsan's allegation that the Administrator utilizes an arbitrary quota system requires constitutional analysis peculiarly within the competence of an independent judiciary." (at 1474)

9) "Without judicial review, statutory limits would be naught but empty words." (at 1477)

Re: Unsettled Law: Conflict Between 7th & 2nd Circuits

Cooper v. United States, No. 88 CIV 6106, slip op., 1989 WL 71213 (S.D. N.Y. June 23, 1989) (available on Lexis at 1989 U.S. Dist. LEXIS 6924); U.S. Supreme Court, cert denied 90-180.

The Southern District court declined to accept Cooper's allegations on the grounds that it was a claim for benefits disguised as a constitutional complaint. Judge Robert Patterson Jr. totally disregarded the contents of said complaint and ignored Cooper's several assertions in the body thereof and elsewhere that he did not seek judicial review of the decision, flawed as it was, but questioned the constitutionality of the VA's procedures which made it impossible to obtain a fair and impartial hearing.

Moreover, Judge Patterson held specifically that the 7th Circuit Court decision in Marozsan was not the law of the 2nd Circuit, preferring instead his erroneous interpretation of Anderson v. Veterans Administration, 559 F.2d, 935 (5th Cir. 1977), which according to Judge Patterson, held that hearing procedures were exempt from judicial review, relying entirely upon cases which were decided

before Johnson (1974) - namely, Ross v. U.S. 462 F.2d, 618 (9th Cir. 1972); and Milliken v. Gleason, 332 F.2d, 122 (1 Cir. 1964) decided before even Goldberg v. Kelly (1970).

Additionally, Judge Patterson mistakenly ruled that the Supreme Court decision in NARS supported his holding that Cooper's case was unreviewable when in fact this Court ruled just the opposite as evidenced from note 3 of Chief Justice Rehnquist's decision. (Supra Pages 36)

The 2nd Circuit affirmed Judge Patterson's decision (without in banc review) and without comment, despite the fact that the 2nd Circuit itself was split on the "Marozsan type" issue; the Southern District going one way, while the Connecticut District Court in Wallace going another. (Supra, Pages 35, 36)

Cooper complained of 13 reversible errors which Judge Patterson made, none of which were addressed by the 2nd Circuit.

Further, this Court denied certiorari. From that brief history, unless this Court grants petitioner's request, disabled veterans of the 2nd Circuit shall have no forum in which to seek judicial redress of the constitutional wrongs inflicted upon them while those of the 7th circuit have judicial license to do so.

Accordingly, this Court must resolve the conflict which currently exists between the 7th and 2nd Circuits pursuant to whether veterans have a right to litigate the constitutionality re the operation of the VA's claim system. In Chicago, you can, but in New York City, you cannot!!?

Unsettled Law: Bernklau v. U.S.

The Court of Appeals for the Federal Circuit (CAFC) declined to accept Bernklau's constitutional complaint on the grounds that P.L.100-687 denied CAFC jurisdiction to hear any issue which was

not previously raised before the Court of Veterans Appeals (CVA). Under the circumstances, in order for Bernklau to be heard in CVA, it would first be necessary to raise that issue before the BVA, which likewise, could not hear it unless it was raised at VA Regional.

Those circumstances place veterans in the peculiar situation of having to bring a constitutional matter to the VA, which asserts that it's not competent to consider such issues. As reported in Johnson, the BVA itself acknowledged in SLY that constitutional issues are "not within the jurisdiction of this Board." Johnson further reasoned that:

> "Sly thus accepts and follows the principle that adjudication of the constitutionality of congressional enactments have generally been thought beyond the jurisdiction of administrative agencies."
>
> Johnson at 368

If the Supreme Court reasons that constitutional issues are beyond the jurisdiction of agencies and perhaps

Article I courts, then how should Bernklau bring his constitutional complaint, and where must he begin? CAFC ducked the issue, will the Supreme Court address it?

Summary

Enacting legislation is one thing, but the administration thereof by bureaucrats is quite another. United States Senator Huey Long clearly understood this when he so wisely counseled against the enactment of § 211(a) saying:

> "How long are we going to sit here and see people turned out of hospitals and starved to death by these little 2 by 4 bureaucrats, exercising more power than the 96 members of the United States Senate? Instead of being men, standing up on 2 legs and 2 feet and running this government for the people of the United States, we are authorizing some bureaucrat to prescribe limits and rules under which he will work, and then permit him to go off and do what he pleases. That is the trouble with the whole "plague-take-it" system, and that is the reason why veterans are in the fix they find themselves today."
> (Cong. Record, June 2, 1933, at 4811)

Judge Learned Hand, in his famous "Spirit of Liberty" address warned

Americans against the false assumption that freedom is secure because the "Framers" enshrined it in the Bill of Rights. He said:

> "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."

Conclusion

Based upon all of the foregoing, VDP believes Bernklau is entitled to judicial review of his constitutional allegations in the Eastern District Court of New York and/or this Court's review of the constitutionality of § 211(a) [now 511(a)], considering that Johnson's holding pursuant to the constitutionality thereof was predicated upon blatant VA falsehoods.

DATED this 11th day of March, 1993.

Respectfully submitted,

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